No. 91-1114

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

CALIFORNIANS FOR A CITIZEN GOVERNMENT,

Petitioner,

v.

THE LEGISLATURE OF THE STATE OF CALIFORNIA; THE SENATE OF THE STATE OF CALIFORNIA; THE ASSEMBLY OF THE STATE OF CALIFORNIA; DAVID ROBERTI; WILLIE L. BROWN, JR.; KENNETH L. MADDY; WILLIAM A. CRAVEN; A. ALAN POST; CALIFORNIA TEACHERS ASSOCIATION; BLACK AMERICAN POLITICAL ASSOCIATION OF CALIFORNIA; ED DAVIS; CECIL GREEN; GARY K. HART; BILL LOCKYER; DAN MCCORQUODALE; ROBERT PRESLEY; DIANE WATSON; BRUCE BRONZAN; PETER R. CHACON; JIM COSTA; DAN E. HAUSER; JOHAN KLEHS; BARBARA LEE; LUCILLE ROYBAL-ALLARD; ALICE HUFFMAN; AURORA CASTILLO; DEBORAH SEILER; MARSHALL SHARPE; PERCY STEELE; STEVE THOMPSON; NEWTON WALLACE; and BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Respondents.

Petition for Writ of Certiorari to the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a new state constitutional amendment, which expressly protects legislators' pension benefits accrued up to the time of its enactment, but which prospectively eliminates the right to participate in the pension plan, violate the Contract Clause of the United States Constitution?

PARTIES TO THE PROCEEDING

The parties to this action in the California Supreme Court were the Legislature of the State of California; the Senate of the State of California; the Assembly of the State of California; David Roberti; Willie L.Brown, Jr.; Kenneth L. Maddy; William A. Craven; A. Alan Post; California Teachers Association; Black American Political Association of California; Ed Davis; Cecil Green; Gary K. Hart; Bill Lockyer; Dan McCorquodale; Robert Presley; Diane Watson; Bruce Bronzan; Peter R. Chacon; Jim Costa; Dan E. Hauser; Johan Klehs; Barbara Lee; Lucille Roybal-Allard; Alice Huffman; Aurora Castillo; Deborah Seiler; Marshall Sharpe; Percy Steele; Steve Thompson; Newton Wallace; Board of Administration of the Public Employees Retirement System; March Fong Eu, Secretary of State; Gray Davis, Controller; Conny McCormack, San Diego County Registrar of Voters; and Californians for a Citizen Government.

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OPINION BELOW

The decision of the California Supreme Court is reported at 54 Cal. 3d 492 (1991), and is reproduced as Appendix A (App.). Page references are to the version in the appendix.

JURISDICTION

The decision of the California Supreme Court, review of which is sought in this petition, was entered on October 10, 1991, and was filed that same day. No petition for rehearing was sought. The petition for writ of certiorari has been timely filed in accordance with Rule 13 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

California Constitution Article IV, Section 4.5, as adopted by the Political Reform Act of 1990 provides:

> "Notwithstanding any other provision of this Constitution or existing law, a person elected to or serving in the Legislature on or after November 1, 1990, shall participate in the Federal Social Security (Retirement, Disability, Health Insurance) Program and the State shall pay only the employer's share of the contribution necessary to such participation. No other pension or retirement benefit shall accrue as a result of service in the Legislature, such service not being intended as a career occupation. This Section

> shall not be construed to abrogate or diminish any vested pension or retirement benefit which may have accrued under an existing law to a person holding or having held office in the Legislature, but upon adoption of this Act no further entitlement to nor vesting in any existing program shall accrue to any such person, other than Social Security to the extent herein provided."

Article I, Section 10, of the United States Constitution provides in pertinent part: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . . "

The creation and operation of the California Legislative Retirement System is found in Government Code § 9350, *et seq*. The full text of the relevant provisions of the above-mentioned statutory provisions are set forth in Appendix B.

STATEMENT OF THE CASE

The Political Reform Act of 1990 (Act), which appeared on the ballot as Proposition 140, was enacted into law by the people of California on November 6, 1990. The Act had three provisions: it set term limits for all state legislators and other elected state officials, it set a cap on the amount of money the Legislature could spend on its internal operations, and it provided that state legislators shall participate in the Federal Social Security System, but that no other pension or retirement benefit shall accrue as a result of service in the Legislature. This last provision further specified that it shall not be construed to abrogate or diminish any vested pension or retirement benefit which may have previously accrued to legislators,

but that no further entitlement to nor vesting in any existing program shall accrue other than Social Security. Cal. Const. Art. IV, § 4.5.

The State Legislature as a whole, individual legislators, voters, and special interest groups petitioned the California Supreme Court for a writ of mandate or prohibition striking down the Act as unconstitutional on a number of grounds. The Legislature named other government officials, two of whom were also subject to the provisions of the Act, as respondents in the action.[1] Petitioner here, representing the proponents and supporters of the Act, intervened in the action below.

The California Supreme Court upheld the constitutionality of term limits, the budget reduction, and the elimination of the Legislative Retirement System (LRS) as applied to legislators elected on or after November 6, 1990. However, the court held that the prohibition against further participation in the LRS by representatives elected prior to November 6, 1990, violated the Contract Clause of the United States Constitution. This petition is directed solely to the court's decision striking down that provision of the Act as applied to incumbent officeholders.

The court below ruled that "under California law, all incumbent legislators acquired a vested right to earn additional pension benefits through continued service, a

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[1] The Board of Administration of Public Employee Retirement System (PERS) was also named as a respondent. Because PERS argued against the constitutionality of the measure on the pension issue, however, it is named as a respondent in this petition.

right which Proposition 140 clearly impairs." App. at A-54.[2]

The court addressed a number of California cases which expanded the federal concept of vested rights, quoting with approval a California Court of Appeal decision which concluded,

> " '[c]ertainly the California pension decisions have never rejected the federal clause as a source of protection. It is now too late to do so. California law places earned pension rights of public officers and employees under the protection of the contract clause *regardless of any characterization adopted by the federal courts.*' " App. at A-58 (emphasis added).

The California court concluded:

> "[I]n light of prior California decisions consistently extending federal contract clause protection to state public officers, it is simply 'too late' to retreat from the clear implication of those holdings. We conclude that the pension restrictions of Proposition 140 are unconstitutional under the federal contract clause as applied to incumbent legislators because they infringe on the vested pension rights of those persons." App. at A-58.

The federal issue on which review is sought in this Court was first raised in the Legislature's petition for writ to the California Supreme Court, which has been the

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[2] Although the court refers to state case law, those cases interpret the federal Constitution. No impairment of contract claim under the California Constitution was ever raised by the Legislature.

only proceeding in this case. The decision of the court below, review of which is sought, directly concerns the federal issue raised in this petition--the Contract Clause of the United States Constitution.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(b) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided a federal question in a way that conflicts with another state court of last resort, or of a Federal Court of Appeals. Rule 10.1(c) includes as a ground for review when a state court of last resort has decided an important question of federal law, which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. All three of these grounds for review are present in this case.

I

THE DECISION BELOW CONFLICTS WITH THIS COURT'S RULINGS THAT PUBLIC OFFICERS HAVE NO CONTRACTUAL RIGHT TO EXTEND EXISTING BENEFITS PROSPECTIVELY

The court below noted the legislators' argument that when incumbent legislators first assumed office, they were impliedly promised pension benefits substantially equivalent to those offered by then-existing provisions of the LRS, and that these benefits included both the right to receive any vested pension benefits upon retirement as

well as the collateral right to earn future pension benefits through continued service, on terms substantially equivalent to those then offered. App. at A-49. The court agreed, saying: "We conclude that incumbent legislators had a vested right to earn additional pension benefits through continued service, despite the potential but unexercised limitations contemplated by article IV, section 4, of the state Constitution." App. at A-51.

The court below further noted legislators' and PERS' contention that pension rights fall into a different category than salary rights.

> "Although a state officer may have no protectible right to continuation of his former salary from term to term, nonetheless *on commencing to serve the state* the officer thereupon acquires a vested right to earn, through continued service, additional pension benefits in an amount reasonably comparable to those available when he or she first took office. According to [legislators], that right is not extinguished when one term of office ends and another commences. [Citation omitted.] To hold otherwise, [legislators] argue, could unduly penalize public officers who serve elective or appointive terms.
>
> "We agree with petitioners. It would be anomalous to hold that a legislator's supposedly 'vested' right to acquire a reasonable pension is subject to absolute divesting at the conclusion of the period comprising his or her immediate term of office (assuming no right to receive actual benefits has yet accrued). Under such a holding, a legislator could entirely lose future pension benefits on the very eve of entitlement thereto." App. at A-52-53 (emphasis in original).

The court below then held: "We conclude that the pension restrictions of Proposition 140 are unconstitutional under the federal contract clause as applied to incumbent legislators because they infringe on the vested pension rights of those persons." App. at A-58. Petitioners emphasize the critical point that this case does not involve an attempt to deprive LRS pensioners from receiving the amount of their pension which accrued prior to November 6, 1990. The Act specifically protects accrued pension benefits. The issue here is whether, under the Contract Clause, legislators are entitled to continued operation of the LRS, without change, *in the future*. Although the court below sought to cloak the issue as one, at least in part, of California law, *see* App. at A-49-50, 57-58, the Legislature only claimed a cause of action under the federal Contract Clause.[3]

This Court has placed a specific interpretation on the Contract Clause with regard to the claims of public officers. In *Newton v. Board of County Commissioners of Mahoning County*, 100 U.S. 548 (1880), this Court ruled that the legislative power of the state is at all times absolute with respect to all offices within its reach. "And it may increase or diminish the salary or *change the mode of compensation*." *Id.* at 559 (emphasis added). The pension benefits here at issue are, of course, part of the mode of legislators' compensation. This Court summed up its rationale: "In all these cases, there can be no contract and

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[3] The provision at issue was enacted as a state constitutional amendment and would prevail over any contravening state statute or state constitutional provision as being the more specific provision. *People v. Western Airlines, Inc.*, 42 Cal. 2d 621, 637 (1954). Thus, no state claim was viable.

no irrepealable law, because they are 'governmental subjects.' " *Id.*

Similarly, this Court held in *Crenshaw v. United States*, 134 U.S. 99, 105 (1890), that the regulation of the salary affixed to an office created for the public use does not fall within the meaning of the Contract Clause, because the salary of public officers does not come within the import of the term "contracts." The Court further explained that no contract exists in these instances because these are governmental subjects that involve public interests. Every succeeding legislature has the same power of repeal and modification as the former had of enactment. *Id.* at 106.

This Court observed in *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938): "As in most cases brought to this court under the contract clause of the Constitution, the question is as to the existence and nature of the contract and not as to the construction of the law which is supposed to impair it." So here, in order to adjudicate an impairment claim, it is first necessary to determine the existence and nature of legislators' contractual rights to the maintenance in perpetuity of the retirement system predating the adoption of the Act.

Significantly, the court below did not identify any agreement between the state and its legislators to maintain the prior system of legislative retirement benefits unchanged and indefinitely. Presumably, the California court relied on the statutory retirement provisions set forth in Government Code § 9350, *et seq.* App. B. The court declared:

> "The state, in adopting the LRS, elected to treat legislators in a manner similar to other

> state employees, providing them with a plan whereby pension benefits could be acquired through continued service beyond their initial term of office. Having done so, the state cannot thereafter abandon that plan as to incumbent legislators without providing them comparable new benefits." *Legislature v. Eu*, 54 Cal. 3d at 531.

However, this Court held in *Dodge v. Board of Education*, 302 U.S. 74 (1937):

> "In determining whether a law tenders a contract to a citizen it is of first importance to examine the language of the statute. If it provides for the execution of a written contract on behalf of the state the case for an obligation binding upon the state is clear. Equally clear is the case where a statute confirms a settlement of disputed rights and defines its terms. On the other hand, an act merely fixing salaries of officers creates no contract in their favor and the compensation named may be altered at the will of the legislature." *Id.* at 78-79 (footnotes omitted).

The Government Code sections establishing the LRS do not provide any obligation binding upon the state to maintain any particular retirement scheme for legislators. Indeed, they could not without violating the State Constitution. Article IV, Section 4, thereof provides in pertinent part: "The Legislature may, prior to their retirement, limit the retirement benefits payable to members of the Legislature who serve during or after the term commencing in 1967." Far from establishing contractual rights to specified levels of retirement benefits, the California Constitution puts legislators on unmistakable notice that they are subject to having their retirement benefits limited. This

reservation of the right to limit benefits puts members of the Legislature in a contractually unique position and effectively distinguishes the cases relied on by the court below regarding the contractual rights of government employees who are not legislators.

The court stressed that Article IV, Section 4, refers to the *Legislature's* authority to limit retirement benefits. App. at A-50. However, the people in granting the legislative power of the state to the California Legislature at the same time reserved to themselves the powers of initiative and referendum. Cal. Const. Art. IV, § 1. *See also Carlson v. Cory*, 139 Cal. App. 3d 724, 729 (1983), holding that an express reference to the power of the "Legislature" to enact laws relating to taxation in no way limits the plenary power of initiative. The Contract Clause analysis in either case remains the same. The point is that because the members of the Legislature were on constitutional notice that their retirement benefits were subject to limitation, there could be no agreement between the members of the Legislature and either the Legislature itself or the people of California to maintain the then-existing retirement system in effect. Thus, there was no contract subject to impairment by the Act.

This Court's holdings in *Pennie v. Reis*, 132 U.S. 464 (1889), and *Dodge v. Board of Education*, 302 U.S. 74, firmly espoused the principle that public employees could enjoy no vested contractual rights in a public pension fund. This Court, in *Pennie*, analyzed the status of compulsory payments made from a policeman's salary into the pension fund, stating:

> "The direction of the State, that the fund should be one for the benefit of the police officer or his representative, . . . was subject to change or

> revocation at any time, at the will of the Legislature. There was no contract on the part of the State that its disposition should always continue as originally provided. Until the particular event should happen upon which the money or a part of it was to be paid, there was no vested right in the officer to such payment. His interest in the fund was, until then, a mere expectancy created by the law, and liable to be revoked or destroyed by the same authority." *Pennie*, 132 U.S. at 471.

Furthermore, in *Dodge*, in which a statute had decreased the amounts of an annuity to be paid retired teachers from the public schools in Chicago, this Court elaborated on the policies at stake:

> "[A] state may enter into contracts with citizens, the obligation of which the legislature can not impair by subsequent enactment. . . . [L]egislation which merely declares a state policy, and directs a subordinate body to carry it into effect, is subject to revision or repeal in the discretion of the legislature. . . . In determining whether a law tenders a contract to a citizen it is of first importance to examine the language of the statute. If it provides for the execution of a written contract on behalf of the state the case for an obligation binding upon the state is clear. . . . On the other hand, an act merely fixing salaries of officers creates no contract in their favor and the compensation named may be altered at the will of the legislature. . . . The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise. He who asserts the creation of a contract with the state

> in such a case has the burden of overcoming the presumption." *Dodge*, 302 U.S. at 78-79 (footnotes omitted).

More recently, this Court reaffirmed the rule that a statute will be treated as a binding contract only "when the language and circumstances evince a legislative intent to create private rights of a *contractual* nature enforceable against the State." *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 17 n.14 (1977) (emphasis added).

For more than 150 years, all courts agreed that the proper interpretation of the Contract Clause, as regards public pensions, precluded the notion of vested rights. The premise was simple: Pensioners could not, and should not, have contractual rights in public moneys. Despite the clear language of this Court, California determined that decades of settled law should be changed. *Kern v. City of Long Beach*, 29 Cal. 2d 848, 852-53 (1947).[4]

The California courts announced that public employees do have vested contractual rights in public pensions. *Kern*; *Allen v. City of Long Beach*, 45 Cal. 2d 128, 131 (1955); *Miller v. State of California*, 18 Cal. 3d 808, 814-15 (1977); *Betts v. Board of Administration of the Public Employees' Retirement System*, 21 Cal. 3d 859, 863-64 (1978); *Allen v. Board of Administration of the Public*

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[4] Interestingly, although *Kern* cites to the California Supreme Court decision in *Pennie v. Reis*, and notes that this Court affirmed that decision, the California court does not once cite to the United States Supreme Court decision in *Pennie*. Other Supreme Court cases are mentioned only at the end of the opinion, preceded by the "*cf.*" signal of contra authority.

Employees' Retirement System, 34 Cal. 3d 114, 119-20 (1983), *appeal dismissed*, 465 U.S. 1015 (1984).[5] The holdings in these cases granted to public employees contractual rights in the pension benefits that had accrued pursuant to their years of service. But in *Legislature v. Eu*, the California Supreme Court expands this line of cases by going one step further: it held that legislators have vested contractual rights in the *future* accrual of pension funds, even if there is no diminution whatsoever in benefits already accrued. This Court has never held that such rights exist. Many cases instead expressly state the opposite contention. *Pennie; Dodge; Higginbotham v. Baton Rouge*, 306 U.S. 535 (1939); *United States Trust Co.; National Railroad Passenger Corp. v. Atchison, Topeka and Santa Fe Railway Co.*, 470 U.S. 451 (1985). Because the California Supreme Court has created a direct conflict with the decisions of this Court on the Contract Clause, certiorari should be granted to resolve the issue.

II

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF UNITED STATES COURTS OF APPEALS THAT THERE IS NO CONTRACTUAL RIGHT TO EXTEND PUBLIC PENSION BENEFITS PROSPECTIVELY

All but one of the Circuit Courts of Appeals that have addressed the issue have expressly followed the Supreme Court's holdings in *Pennie* and *Dodge*. In rejecting the

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[5] Each of the cases subsequent to *Kern* cite *Kern* as controlling authority. As already noted, the basis for *Kern* itself stands on shaky ground.

analysis employed by this Court in a long line of cases typified by *Pennie*, *Dodge*, and *United States Trust Co.*, the California Supreme Court created a direct conflict between itself and at least six United States Circuit Courts of Appeals.

The clearest example of this conflict is found in the First Circuit case of *MacLeod v. Fernandez*, 101 F.2d 20, 22 (1st Cir. 1938), *cert. denied sub nom. Toste v. MacLeod*, 308 U.S. 561 (1939). In that case, the court held that a pensioner's "embryonic" right to a pension is merely a future expectation worthy of no more constitutional protection than the pensioner received in *Pennie*. The First Circuit has maintained its traditional position to the present day. In the recent case of *Hoffman v. City of Warwick*, 909 F.2d 608, 614 (1st Cir. 1990), the court reiterated the theme that the Contract Clause is applicable to *contracts* into which a state enters, and that normally state statutory enactments do not of their own force create a contract with those whom the statute benefits.

Other circuits have also followed this Court's directive. In *Pineman v. Oechslin*, 637 F.2d 601, 605 (2d Cir. 1981), the court held that where an express statement of legislative intent is lacking, there are no rights, contractual or otherwise, under a pension plan until the state employee satisfies all the eligibility requirements for receiving benefits. No prospective "future" vesting was allowed. Furthermore, the court noted that the traditional view was "still adhered to in many jurisdictions." *Id.*

In *Rafferty v. United States*, 210 F.2d 934, 936 (3d Cir. 1954), the Third Circuit agreed that no contractual right to future vesting exists. The court stated that "[t]he law is

clear that even where, as here, there has been compulsory contribution to a retirement or pension fund the employee has no vested right in it until the particular event happens upon which the money or part of it is to be paid." *Id.* Although the LRS does not require compulsory contributions, the broad language in *Rafferty* is such as to subsume a voluntary system into its holding. Similarly expressing general agreement is the Eighth Circuit in *Deal v. Federal Housing Administration*, 260 F.2d 793, 797-99 (8th Cir. 1958). *Dodge* and *Pennie* are cited in both cases as providing controlling authority.

The Sixth Circuit, in *In re Goodwin*, 57 F.2d 31, 32 (6th Cir. 1932), specifically addressed the issue of whether the *Dodge* and *Pennie* rules would apply to a fund where the pensioners voluntarily contributed. Despite this feature which distinguished the case from many of the others (which had compulsory contributions), the court held nonetheless that

> "[a] pension is a gratuity in which the recipient has no vested legal right. . . . [A] pension fund established and maintained by tax levies, but to which prospective beneficiaries have contributed, is a public fund in which the contributors have no vested rights which cannot be taken away by subsequent legislation." *In re Goodwin*, 57 F.2d at 31-32.

Thus, the fact that legislators may elect to participate in the LRS does not alter the analysis.

The District of Columbia Circuit has a long history of following the traditional doctrine. In *Abbott v. Morgenthau*, 93 F.2d 242, 245 (D.C. Cir. 1937), *cert. denied*,

303 U.S. 638 (1938), the court generally agreed that pensions are gratuities which can be rescinded at the whim of Congress. More recently, in *Kizas v. Webster*, 707 F.2d 524, 535 (D.C. Cir. 1983), *cert. denied sub nom. Kizas v. United States*, 464 U.S. 1042 (1984), the court demonstrated the currency of the older cases and restated the prevalent doctrine: "[C]ourts have consistently refused to give effect to government-fostered expectations that, had they arisen in the private sector, might well have formed the basis for a contract or an estoppel."

The Ninth Circuit, perhaps not coincidentally the circuit in which California is located, has embraced, to a limited extent, the theories of the California courts. In *State of Nevada Employees Association, Inc. v. Keating*, 903 F.2d 1223, 1227 (9th Cir.), *cert. denied*, 112 L. Ed. 2d 565 (1990), the court acknowledged that federal rather than state law controls whether state statutes create contractual rights under the Contract Clause. Then, contrary to that federal law, and with citation to a Nevada state court opinion, the court held that nonvested employees have contractual rights in pension plans, subject to reasonable modification to keep the system flexible to meet changing conditions and to maintain actuarial soundness. *Id.* at 1227. This opinion, contrary to the other circuits and following a distinctly minority position among the states, further demonstrates the importance of this Court's taking up this matter to resolve these differences.

The conflict presented between the California Supreme Court and the circuits is direct and concrete. This Court should grant certiorari to settle this conflict.

III

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER STATE SUPREME COURTS THAT THERE IS NO RIGHT UNDER THE CONTRACT CLAUSE TO EXTEND PUBLIC PENSION BENEFITS PROSPECTIVELY

In addition to the federal cases cited above, a number of state Supreme Courts have also reviewed this issue and come to a conclusion in direct conflict with that of the California Supreme Court. A few other states, such as Colorado[6] and Arizona[7] have followed California's lead and have found varying levels of contractual rights, ranging from fully vested rights to concepts of limited vesting and promissory estoppel. However, even those states which have adopted California's vested rights theory for previously accrued benefits have not gone so far as to find *future* contractual rights (especially when the job itself has no such guarantees).[8]

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[6] Despite a clear statement of the law by the Colorado Supreme Court in *Board of Trustees of Firemen's Pension Fund for City & County of Denver v. People ex rel. Behrman*, 119 Colo. 301, 203 P.2d 490 (1949), that refused to adopt the contractual right theory, ten years later Colorado reversed its position and accepted that theory in *Police Pension and Relief Board of the City and County of Denver v. McPhail*, 139 Colo. 330, 338 P.2d 694 (1959).

[7] *Yeazell v. Copins*, 98 Ariz. 109, 402 P.2d 541 (1965).

[8] Although more than 30 states have addressed some aspect of the issue now before the Court, only a representative sample are noted in this petition. A comprehensive review of the state decisions before 1957 can be found in *Vested Rights of Pensioner to Pension*, 52 A.L.R. 2d 437 (1957).

In *Pineman v. Oechslin*, 195 Conn. 405, 488 A.2d 803, 804 (1985), the Connecticut Supreme Court held that state employees did not have a contractual interest in the State Employees Retirement Act:

> "[T]here exists a 'well-established presumption' against finding that a statute creates private vested contractual rights absent a clear showing of legislative intent to the contrary. . . . Since the effect of such authorization is to surrender the legislature's governmental power of revision and to restrict the legislative authority of succeeding legislatures, a legislative intent to create contractual rights will not be assumed unless the statutory language expressing such intent is clear and unambiguous." *Id.* at 807.

The court continued its analysis by noting the emergence of the contractual approach used in some other states:

> "Although there is a seductive appeal in the contract-oriented approaches adopted by other jurisdictions, we decline to depart from the well established rules of statutory construction, . . . namely, that a statute does not create vested contractual rights absent a clear statement of legislative intent to contract. . . . [T]he contract approach plays havoc with basic principles of contract law, traditional contract clause analysis and, most importantly, the fundamental legislative prerogative to reserve to itself the implicit power of statutory amendment and modification. See Flemming v. Nestor, 363 U.S. 603, 610-11 . . . (1960)." *Id.* at 808 (citation omitted).

After considering the preceding arguments, the court found that a statutory pension plan which gives rise to

contractual rights in public employees, while permitting unilateral modification of the pension "contract" by the state under certain circumstances, defied the basic contract law tenet that modification requires mutual assent. *Id.* at 808-09.

The court then considered whether a limited vesting concept might be used in this context. Again, this was rejected. The court found that such a concept would conflict with basic contract law and contract clause analysis. The court said: "It makes little sense to strain established rules of statutory interpretation to find a contract where the requisite express legislative intent is lacking, only to strain other equally well settled legal principles to allow for necessary unilateral modification by the state." *Id.* at 809.

The court stressed that if the legislature intends to surrender its powers of amendment and revision by creating a contract which binds future legislatures, it must declare that intention in clear and unambiguous terms. The legislature may not relinquish this authority by legislative inadvertence or judicial implication. To hold otherwise " 'requires the legislature and pension fund administrators to walk a tight rope whenever changes are indicated, and to accept risks which may turn into substantial financial obligations years after the fact.' " *Id.* (citing Cohn, *Public Employees' Retirement Plans—The Nature of the Employees' Rights*, U. Ill. L. Rev. 48 (1968)).

The Montana Supreme Court directly addressed the issue of whether particular benefits must be continued in the future as they were in the past in *Wage Appeal of Montana State Highway Patrol Officers v. Board of Personnel Appeals*, 208 Mont. 33, 676 P.2d 194 (1984). In that case, the

petitioners contended that as a matter of law, highway patrol officers had vested contractual rights to the continuation of 1% longevity increments. The court rejected this contention, stating that "when the Legislature enacts a statute fixing certain terms and conditions of public employment, such as salaries and compensation, it is presumed that the statute does not create contractual rights, but is intended merely to declare a policy to be pursued until the Legislature declares otherwise." *Id.* at 41.

The New Jersey Supreme Court has decided pension cases consistent with the basic principles set forth by this Court. In *Spina v. Consolidated Police and Firemen's Pension Fund Commission*, 41 N.J. 391, 197 A.2d 169 (1964), pensioners challenged the reduction of benefits in a compulsory system. The court acknowledged the contractual rights theories advanced in other jurisdictions, but explained:

> "The difficulty with the contract approach is that it cannot withstand the pressures upon it. If the contractual obligation of the public employer is really to equal the expectations of all of the rank-and-file members, it must include a guaranty by the employer of the solvency of the fund. . . . California, which is the leading exponent of the contract thesis, holds the Legislature may revise a plan 'to maintain the integrity of the system,' which, if we correctly read the opinions, means that the public employer does not guarantee the solvency of the plan. Allen v. City of Long Beach, 45 Cal. 2d 128 . . . (1955). Moreover, even as to the disposition of the fund itself, the contract concept is cumbersome. What happens if the plan is

> unsound, so that little or nothing will remain for those presently contributing? May there be a judicial receivership and some equitable proration if all parties to the plan cannot agree upon a program of rehabilitation? As a practical matter, legislative intervention is the only sensible approach. The California cases . . . recognize a legislative power of revision, with the proviso that a benefit that is taken away is reasonably offset by something added. True, the needed power in the Legislature to revise a plan without the consent of the parties to the 'contract' could be said to be 'implied,' but it seems odd to say the State may unilaterally rewrite its own contract or rewrite contracts between its municipal agents and others. We think it more accurate to acknowledge the inadequacy of the contractual concept." *Id.* at 175-76 (citations omitted).

Thus, the New Jersey Supreme Court duly noted, explored, and rejected the California contract approach for its lack of a sound basis.

In *City of Dallas v. Trammel*, 129 Tex. 150, 101 S.W.2d 1009, 1012 (1937), the Texas Supreme Court emphatically rejected the contract approach as inconsistent with the settled rules of legislative power.

> "[E]mployees, in making contracts of employment under which the right to participate in the pension fund accrues, do so in contemplation of the reserved right of the Legislature to amend or to repeal the laws on which the pension systems are founded; and therefore the right to participate in the fund, even though arising from the contract, is based upon the anticipated continuance of existing laws. Under this theory, there

> can be no vested interest in the future installments of pensions which will prevent the Legislature from repealing the law upon which the system is founded, or modifying the law in such way as to diminish the amount of future monthly payments. This is true even though the pension fund is made up partly with deductions from salaries or wages agreed to be paid participating employees. It is well settled that the mere circumstance that a part of a pension fund is made up by deductions from the agreed compensation of employees does not in itself give the pensioner a vested right in the fund, and does not make it any less a public fund subject to the control of the Legislature. State v. Board of Trustees, 192 Mo. App. 583, 184 S.W. 929, 933, 188 S.W. 239; State v. Board of Trustees, 121 Wis. 44, 98 N.W. 954." *Id.* at 157.

West Virginia also specifically addressed the issue of future benefits. In *Taylor v. Board of Education of the County of Cabell*, 152 W. Va. 761, 166 S.E.2d 150 (1969), the employees did not contribute any funds to the pension fund system; rather, the state provided all the money from taxes. The court held that "a pension granted by a public authority is not a contractual obligation but is a gratuitous allowance, in the continuance of which the pensioner has no vested right, and accordingly, the pension is terminable or alterable at the will of the grantor." *Id.* at 153-54. Even though the court recognized an exception to the general rule, that any particular payment under a pension plan which has become due is vested, the court emphasized that this exception applied only to payments that have accrued, and it did not confer vested rights to future payments:

> "[I]f the pension law is still in effect when a payment under terms of that law becomes due the pensioner, he thereby acquires a vested right in such payment because it accrues to him under a law then in effect and not because of any consideration flowing from the pensioner that binds the government to pay him anything. This could not be said of future payments that have never accrued when the law is amended or repealed." *Id.* at 155.

In New York, the state's high court in *Cook v. City of Binghamton*, 48 N.W.2d 323, 422 N.Y.S.2d 919, 398 N.E.2d 525 (1979), explained how it approached the question:

> "We begin our analysis with the observation that '(t)he principal function of a legislative body is not to make contracts but to make laws which declare the policy of the state and are subject to repeal when a subsequent Legislature shall determine to alter that policy. Nevertheless, it is established that a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions with the protection of article I, s 10.' " *Id.* at 527 (citing *Indiana ex rel. Anderson v. Brand*, 303 U.S. at 100).

The New York court in considering whether a state statute impairs the obligation of a contract, ruled that "the existence of the contract and the nature and extent of its obligations become federal questions which are to be determined by an appraisal of the statutes of the State and the decisions of its courts." *Cook*, 398 N.E.2d at 527-28. Generally, a statute will be considered a contract when its language and the circumstances manifest a

legislative intent to create private contractual rights enforceable against the state. *Id.*

Citing *Dodge*, the court went on to note that certain types of legislative acts, including those fixing salaries and compensation, or setting the term and tenure of public officers, are not presumed to create a contract:

> "The prospective salary or other emoluments of a public office are like daily wages unearned, and which may never be earned; the incumbent may die or resign, and his place be filled, and the wages earned by another. The right to the compensation grows out of the rendition of the services, and not out of any contract between the government and the officer, that the services shall be rendered by him." *Cook*, 398 N.E.2d at 528-29.

Despite the overwhelming authority to the contrary, a few states have followed the path invented by California. For example, in Minnesota, despite clear language from the high court of that state upholding the traditional doctrine in 1914, the court later reversed itself and embraced the contract approach. The dramatic difference is illustrated by the Minnesota Supreme Court itself. First, it wrote that

> "[a]s against the state there is no vested right in the pension accruing in the future from month to month. It may be taken away. The whole pension system may be abrogated without a violation of the Constitution." *Gibbs v. Minneapolis Fire Department Relief Association*, 125 Minn. 174, 176, 145 N.W. 1075, 1076 (1914).

Then, in *Christensen v. Minneapolis Municipal Employees Retirement Board*, 331 N.W.2d 740, 745-46 (Minn. 1983), the

court disavowed *Gibbs*, holding revision of a pension plan unconstitutional using a promissory estoppel analysis. The Minnesota court bluntly stated that it was contravening decades of contrary authority.[9]

Because each of the states' decisions depends on an evaluation of the pension plan at issue's particular statutory basis, there are necessarily some areas of distinction between those cases and the one before this Court. However, whatever factual distinctions may exist do not eliminate the conflicts between those states which accept the age-old doctrine forbidding vested contractual rights in future public pension benefits and California, which has completely abrogated that line of cases.

California itself has shown inconsistency in its application of its own doctrines. This was inevitable, as rights created without any legitimate foundation must often be contorted and remolded to fit the issue of the moment. California had taken the position that a pension had the attributes of a salary, that is, deferred compensation. *Kern*, 29 Cal. 2d at 853; *Miller*, 18 Cal. 3d at 814-15; *Allen*, 34 Cal. 3d at 120. The pension was determined to be an incentive for qualified people to work in the public sector or was designed to help make up for the lower public sector salaries. That reasoning prompted California to give public pensions contractual meaning despite, at that time, unanimous contrary authority. Now, when the court

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[9] Kansas also expressly disapproved its prior decisions in *Singer v. City of Topeka*, 227 Kan. 356, 607 P.2d 467, 473 (1980), choosing instead to adopt the California rule as stated in *Allen v. City of Long Beach*, 45 Cal. 2d 128. Similarly, Utah has chosen to follow the contractual approach. *Ellis v. Utah State Retirement Board*, 757 P.2d 882 (Utah 1988).

deciding *Legislature v. Eu* was faced by a California Supreme Court decision, *Olson v. Cory*, 27 Cal. 3d 532 (1980), holding that there exists no vested right to a salary at the start of a new term of office, the court switches positions and claims that a salary is *not* the same as a pension.[10] That announcement permits the court to distinguish its own decision, decided only ten years before, that no future vesting of compensation could occur. The decision below's attempt to distinguish *Olson* is unconvincing, as it relies on a California Court of Appeal decision which in turn depended on contravening all the California Supreme Court language analogizing salaries and pensions. By this string of decisions culminating in *Legislature v. Eu*, the California court has strained basic Contract Clause doctrine to the breaking point.

Each state court that has chosen to depart from this Court's line of cases holding that future pension benefits cannot be the subject of vested contractual rights has done so not by looking to precedent and legal doctrine, but by deciding simply that the contract approach is more "enlightened." The older cases are not distinguished on any valid basis, merely summarily disapproved. This practice of judicial creation of constitutional rights where none before existed contravenes the principles of *stare*

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[10] The court in *Olson* seemed to predict this very issue. Footnote 4 of the opinion, referring to *Betts*, 21 Cal. 3d 808, states that "[w]hile *Betts* deals with questions of a pensioner's —as distinguished from an employed person's—contractual benefits, it is clear a pensioner's contractual benefits are merely derivative from covenants of employment." *Olson*, 27 Cal. 3d at 540 n.4.

decisis, controlling precedent, and government according to law.

As shown by the decisions of states upholding the traditional analysis, none of the contractually-based theories have any basis in precedent prior to the California decisions which created these rights out of whole cloth. Furthermore, the theories are unsound in law and policy. The decision of the California Supreme Court stands in direct conflict with the traditional decisions and this Court should grant review to resolve that conflict.

IV

THIS CASE INVOLVES AN IMPORTANT ISSUE OF LAW THAT SHOULD BE RESOLVED BY THIS COURT

The importance of this case is found both in the breadth of its impact and the nature of the issue raised. At a minimum, the outcome of this case affects all taxpayers in the State of California, who currently are forced to subsidize a system they amended the state constitution to eliminate. Another measure of the impact of this case is the amount of litigation that has already taken place on this issue. In addition to the cases cited above, this issue has been before the courts in more than half of the states in the union. As noted, a minority of states have accepted to some extent California's analysis of the Contract Clause in relation to public pension funds.

If the decision below is allowed to stand, the governing bodies of all states, to their surprise, may find that decisions made decades ago imposed immutable obligations upon all future legislatures (and the people through

the reserved power of initiative) to underwrite the solvency of plans with liabilities running into millions of dollars. This will be so notwithstanding a long line of cases which assured them that such enactments would remain within their power to revise. The responsibility for creating public contracts is the Legislature's. A commitment of that kind should be so plainly expressed that one cannot doubt the individual legislator understood and intended it. The language creating and maintaining the LRS does not have such an express, or even implied, commitment. Contractual rights have been summarily created where none before existed. Thus, the Court should grant review to settle an important question of federal constitutional law impacting a significant segment of the population.

CONCLUSION

The historic authority of this Court's decisions on Contract Clause application to public pensions, carried down to present day cases, should be maintained because of the fundamental soundness of the principles upon which those decisions were based. The public welfare cannot be compromised by holding that the Legislature or the people of a state are eternally saddled with a public policy they wish to change.

The conflict presented by the decision of the California Supreme Court is clear and unmistakable. The California court has rejected the decisions of this Court, six United States Circuit Courts of Appeals, and many other state Supreme Courts. In holding that public employees have a constitutional right to the continued existence of a

pension plan without change, the California court upheld the expenditure of taxpayer dollars that the taxpayers no longer wish to provide.

Review by this Court is necessary to resolve the above-noted conflicts created by the California Supreme Court's decision. Review is also necessary so that this Court can resolve the important question of Contract Clause law. Petitioner respectfully urges this Court to grant this petition for writ of certiorari and reverse the judgment of the California Supreme Court.

DATED: January 8, 1992.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

LEGISLATURE OF THE STATE OF CALIFORNIA et al.,	)	
Petitioners,	)	S019660
v.	)	
MARCH FONG EU, as Secretary of State, etc., et al.,	)	
Respondents;	)	(Filed Oct. 10, 1991)
CALIFORNIANS FOR A CITIZEN GOVERNMENT,	)	
Intervener.	)	

In this proceeding, we consider constitutional challenges to an initiative measure adopted at the November 6, 1990, General Election. This measure, entitled by its framers "The Political Reform Act of 1990," was designated on the ballot as Proposition 140. Its stated purpose is to "restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office" by limiting "the powers of incumbency." (Cal. Const., art. IV, § 1.5, added by Prop. 140.) The measure seeks to accomplish these goals by these three separate reforms: "retirement benefits [of legislators] must be restricted, state-financed incumbent staff and support services limited, and limitations placed upon the number of terms which may be served." (*Ibid.*)

Petitioners herein include the California Legislature (both Senate and Assembly), certain individual legislators from both houses, and various citizens, voters and taxpayers. Petitioners jointly assert a variety of challenges to the constitutionality of Proposition 140.

Respondents are various public officials (including the Secretary of State, the state Controller, and the Board of Administration of the Public Employees Retirement System [PERS]) responsible for implementing, enforcing or applying the new measure. Intervener, Californians for a Citizen Government, is the organization that sponsored Proposition 140. Several amici curiae have filed briefs supporting the various parties.

Only intervener (represented by the Pacific Legal Foundation) and respondent Secretary of State (represented by the Attorney General) have filed briefs adverse to petitioners. Respondent state Controller remains neutral, while respondent PERS supports petitioners' challenge to the pension limitations of Proposition 140, but takes no position on the remaining issues. Nonetheless, for convenience, we sometimes refer to intervener and respondent Secretary of State jointly as "respondents."

The petition for mandate sought original relief in this court. Although we customarily decline to exercise such jurisdiction, preferring initial disposition by the lower courts, the present case involves issues of sufficient public importance to justify departing from our usual course. As we recently observed in *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 340 [276, Cal.Rptr. 326, 801 P.2d 1077] (assessing the constitutionality of Proposition 115, an

initiative measure adopted at the June 1990 Primary Election), quoting from an earlier case, " 'It is uniformly agreed that the issues are of great public importance and should be resolved promptly. Accordingly, under well settled principles, it is appropriate that we exercise our original jurisdiction. [Citations.]' . . . " (See also *Planned Parenthood Affiliates v. Van de Kamp* (1986) 181 Cal.App.3d 245, 262-265 [226 Cal.Rptr. 361].)

Pending our review of the issues, on June 14, 1991, we temporarily stayed operation of section 5 of Proposition 115, which imposes budgetary restrictions on the Legislature, as hereafter discussed.

The principles that guide us in evaluating the validity of initiative measures such as Proposition 140 are likewise well settled. Although the legislative power under our state Constitution is vested in the Legislature, "the people reserve to themselves the powers of initiative and referendum." (Cal. Const., art. IV, § 1.) Accordingly, the initiative power must be *liberally construed* to promote the democratic process. (*Raven v. Deukmejian, supra,* 52 Cal.3d at p. 341.) Indeed, it is our solemn duty to jealously guard the precious initiative power, and to resolve any reasonable doubts in favor of its exercise. (*Ibid.*, and cases cited.) As with statutes adopted by the Legislature, all presumptions favor the validity of initiative measures and mere doubts as to validity are insufficient; such measures must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 814 [258 Cal.Rptr. 161, 771 P.2d 1247] [evaluating the constitutionality of Prop. 103, an insurance rate initiative measure adopted at the Nov. 1988 Gen. Elec.].)

As will appear, we conclude that although the pension restrictions of Proposition 140 are invalid as to incumbent legislators, the measure is constitutionally valid in all other respects. Before addressing petitioners' challenges, we briefly outline the basic provisions of the new measure, which consists entirely of various amendments to the state Constitution.

I. SUMMARY OF PROPOSITION 140

A. *Statement of Purpose and Findings*

Section 1.5 is added to article IV of the Constitution (the "Legislative" article), to set forth various findings and statements of the framers' intent. In pertinent part, this introductory provision recites that although "the Founding Fathers established a system of representative government based upon free, fair, and competitive elections," nonetheless an "extremely high number of incumbents" are reelected by reason of "[t]he ability of legislators to serve unlimited number of terms, to establish their own retirement system, and to pay for staff and support services at state expense . . . . "

The introductory statement continues by noting that "These unfair incumbent advantages discourage qualified candidates from seeking public office and create a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers." The statement concludes by stating that, "To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office, the people find and declare that the powers of incumbency must be limited," as provided by the substantive amendments we now discuss.

B. *Term Limitations*

The measure imposes specific term limitations for state legislators and various state constitutional officers. Persons elected or appointed on or after November 6, 1990, to the office of Governor (Cal. Const., art. V, § 2), Lieutenant Governor (*id.*, § 11), Attorney General (*ibid.*), Controller (*ibid.*), Secretary of State (*ibid.*), Treasurer (*ibid.*), Superintendent of Public Instruction (*id.*, art. IX, § 2), or to the State Board of Equalization (*id.*, art. XIII, § 17), or the state Senate (*id.*, art. IV, § 2, subd. (a)), are limited to two terms. Members of the Assembly are limited to three terms (*ibid.*).

Section 7 is added to article XX of the Constitution (the "Miscellaneous Subjects" article), to explain that the foregoing term limitations "apply only to terms to which persons are elected or appointed on or after November 6, 1990, except that an incumbent Senator whose office is not on the ballot for the general election on that date may serve only one additional term," and that the foregoing term limits "shall not apply to any unexpired term to which a person is elected or appointed if the remainder of the term is less than half of the full term."

C. *Budgetary Limitations*

The measure imposes a budgetary limitation for the Legislature. Section 7.5 is added to article IV of the Constitution to provide that, for the forthcoming fiscal year, "the total aggregate expenditures of the Legislature for the compensation of members and employees of, and the

operating expenses and equipment for, the Legislature may not exceed" $950,000 "per member" for that fiscal year, or 80 percent of the amount of money expended for such purposes in the preceding year, whichever is less.

Additionally, new section 7.5 of article IV of the Constitution provides that, for each fiscal year thereafter, the total aggregate expenditures may not exceed the amount expended during the previous year, "adjusted and compounded by an amount equal to the percentage increase in the appropriations limit for the state established pursuant to Article XIII B" of the Constitution.

D. *Pension Limitations*

Finally, the measure imposes limitations on legislators' pension rights. New section 4.5 is added to article IV of the Constitution to provide that the state will contribute the employer's share to the federal Social Security system on behalf of participating legislators "elected to or serving in the Legislature on or after November 1, 1990," but "[n]o other pension or retirement benefit shall accrue as a result of service in the Legislature, such service not being intended as a career occupation."

This same provision further provides that "This Section shall not be construed to abrogate or diminish any vested pension or retirement benefit which may have accrued under an existing law . . . , but upon adoption of this Act no further entitlement to nor vesting in any existing program shall accrue to any such person, other than [federal] Social Security . . . . "

Respondent state Controller confirms that, as of the effective date of Proposition 140, he ceased making deductions from the salaries of incumbent legislators for the Legislators' Retirement Fund in connection with services rendered after that date, and has also terminated paying employer or state contributions to that fund for those services.

E. *Severance Clause*

In addition to the foregoing provisions, subdivision (d) is added to section 11 of article VII of the Constitution (the "Public Officers and Employees" article). Section 11 of article VII previously had limited the obligations of the Legislators' Retirement System to persons first entering state office after January 1, 1987. Subdivision (d) now sets forth a severance clause reciting that "If any part of this measure or the application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications which reasonably can be given effect without the invalid provision or application." We discuss the matter of severance below in connection with our discussion of the invalid pension restrictions.

II. DISCUSSION

A. *Lifetime Ban or Limit on Consecutive Terms*

As a preliminary matter, we must address the interpretive question whether Proposition 140 imposes a "lifetime ban" on officers who have served the specified

number of terms, or merely limits the number of *consecutive* terms they may serve. With respect to state legislators, petitioners and intervener assume that once a legislator has served the prescribed maximum number of terms, the measure would forever bar him or her from running for a seat in the legislative house previously served. Respondent Secretary of State, contends, however, that the term limitation "is directed only at the *incumbent office holder.*" (Italics in original.) In her view, the measure simply limits the number of consecutive terms served, and she suggests that a former legislator might run for a new term of office if he or she is not currently holding that office.

We focus first on the language of the new measure. The introduction to Proposition 140 refers to curtailing "[t]he ability of legislators to serve unlimited . . . terms," by limiting "the number of terms which may be served." (Cal. Const., art. IV, § 1.5.) Thus, the limitation on the term of state Senators adds the language, "No Senator may serve more than 2 terms," to the existing language of the Constitution that "The Senate has a membership of 40 Senators elected for 4-year terms, 20 to begin every 2 years." (Cal. Const., art. IV, § 2, subd. (a).) The limitation on Assembly members is similarly phrased, stating that "No member of the Assembly may serve more than 3 terms." (*Ibid.*) As petitioners observe, the foregoing provisions do not expressly refer to the number of *consecutive* terms served. Moreover, the measure repeatedly announces its intent to eliminate "career politicians" (see Cal. Const., art. IV, §§ 1.5, 4.5), language which would support the view that a lifetime ban was intended.

Respondent Secretary of State points out, however, that these limitations are directed to a "Senator" or "member of the Assembly," rather than a "person," and she argues that a literal interpretation of the measure thus discloses an intent to limit the right of an *incumbent* legislator to continue unabated terms in office. In respondent Eu's view, once the incumbent legislator has left office, he or she can no longer be described as a "Senator" or "member of the Assembly" to which the term limitation provision would apply.

Petitioners argue that even a purely literal reading of Proposition 140 would support their interpretation: A person who, having already served two prior terms as Senator, surrenders his or her seat for one term and thereafter enters on a third Senate term, could be accurately described as a "Senator" who is "serv[ing] more than 2 terms" contrary to the language of Proposition 140. Intervener suggests that respondent Eu's interpretation, with its emphasis on limiting only *incumbents*, could lead to absurd results, permitting a legislator to avoid the term limitations by resigning shortly before his or her final term had expired, and thereupon announcing an intent to run for reelection unencumbered by any term limitations applicable to "incumbents."

Nonetheless, we agree with respondent Eu that the language of Proposition 140 is ambiguous as to its intent to impose a lifetime ban. As we have previously recognized, to help resolve such ambiguities "it is appropriate to consider indicia of the voters' intent other than the language of the provision itself. [Citation.]" (*Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 250 [279 Cal.Rptr. 325, 806 P.2d 1360].) Such indicia

include the analysis and arguments contained in the official ballot pamphlet. (See *ibid.*; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245-246 [149 Cal.Rptr. 239, 583 P.2d 1281] [hereafter *Amador*].) These materials strongly support the position of petitioners and intervener that a lifetime ban from office was contemplated by the framers of, and voters for, Proposition 140.

First, the analysis by the Legislative Analyst described the term limitations as limiting "the number of terms that an elected state official can serve in the *same office* . . . . " (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with argument to voters, Gen. Elec. (Nov. 6, 1990) p. 69, italics in original [hereafter Ballot Pamphlet].) No suggestion is made that only a consecutive term limitation was contemplated.

Second, and more significantly, the opponents' ballot arguments against Proposition 140 forcefully and repeatedly stressed the measure's "lifetime ban," and criticized the proponents' failure to disclose that particular aspect of the measure in their arguments to the voters. Indeed, *the primary thrust* of the opponents' ballot arguments was directed to this aspect of the measure. (See Ballot Pamp., *supra*, at pp. 70-71.) The argument against Proposition 140 used the phrases "lifetime ban," "banned for life," or similar terminology *11 times*. (*Ibid.*)

We are mindful of the fact that ballot measure opponents frequently overstate the adverse effects of the challenged measure, and that their "fears and doubts" are not highly authoritative in construing the measure. (*DeBartolo Corp. v. Fla. Gulf Coast Trades Council* (1988) 485 U.S. 568,

585 [99 L.Ed.2d 645, 661, 108 S.Ct. 1392].) Nonetheless, we find it significant that the proponents failed to contradict the opponents' "lifetime ban" argument. (See *D'Amico v. Board of Medical Examiners* (1970) 6 Cal.App.3d 716, 725 [86 Cal.Rptr. 245].) Moreover, the proponents stressed that Proposition 140 was directed at eliminating "career politicians" or "career legislators," and suggested that "good legislators will always have the opportunity to move *up the ladder*." (Italics added.) These arguments seem to reinforce the idea that a lifetime ban was intended.

We think it likely the average voter, reading the proposed constitutional language as supplemented by the foregoing analysis and arguments, would conclude the measure contemplated a lifetime ban against candidacy for the office once the prescribed maximum number of terms had been served. As we stated in *In re Lance W.* (1985) 37 Cal.3d 873, 889 [210 Cal.Rptr. 631, 694 P.2d 744], "In construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, *the intent of the enacting body is the paramount consideration.*" (Italics added.)

Respondent Eu suggests that the applicable principle of interpretation requires us to avoid any constitutional "doubts" or "difficulties" by adopting a construction which will render the measure constitutional. (E.g., *Kortum v. Alkire* (1977) 69 Cal.App.3d 325, 333-334 [138 Cal.Rptr. 26].) We find no cases suggesting, however, that this interpretive principle precludes resort to extrinsic evidence to resolve possible ambiguities in a measure. Moreover, as we explain in this opinion, the measure's lifetime ban *is* constitutional in all respects.

We conclude that Proposition 140's term limitations extend over the lifetime of each affected office holder.

B. *Constitutional Revision or Amendment*

Turning to petitioners' constitutional challenges to Proposition 140, they first contend that the measure, and particularly its term and budgetary limitations on the Legislature, effected a constitutional revision rather than a mere amendment. Although "[t]he electors may amend the Constitution by initiative" (Cal. Const., art. XVIII, § 3), a "revision" of the Constitution may be accomplished only by convening a constitutional convention and obtaining popular ratification (*id.*, §§ 2, 4), or by legislative submission of the measure to the voters (*id.*, §§ 1, 4). (See also *Raven v. Deukmejian, supra,* 52 Cal.3d at p. 349.)

Raven suggested that the revision provision is based on the principle that "comprehensive changes" to the Constitution require more formality, discussion and deliberation than is available through the initiative process. (52 Cal.3d at pp. 349-350.) We should bear in mind, however, that the initiative process may represent the only practical means of achieving the kind of "reforms" of the Legislature involved here, because the revision process can be initiated only with the consent of two-thirds membership of each house of the Legislature. (Cal. Const., art. XVIII, §§ 1, 2.)

In *Raven*, citing earlier cases, we observed, "Although the Constitution does not define the terms 'amendment' or 'revision,' the courts have developed some guidelines

helpful in resolving the present issue. As explained [in prior cases], our revision/amendment analysis has a dual aspect, requiring us to examine both the quantitative and qualitative effects of the measure on our constitutional scheme. Substantial changes in either respect could amount to a revision." (52 Cal.3d at p. 350.)

Thus, a constitutional "revision" need not involve widespread deletions, additions and amendments affecting a host of constitutional provisions and resulting in a quantitative revision. "[E]ven a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also." (*Amador, supra,* 22 Cal.3d at p. 223; see *Raven v. Deukmejian, supra,* 52 Cal.3d at pp. 351-352.)

In *Raven,* we unanimously struck down as an improper revision the provision of Proposition 115 that, in essence, would have vested in the United States Supreme Court all interpretive power as to certain fundamental procedural rights of criminal defendants under the state Constitution. We observed that the challenged provision would have "devastating" effects, by drastically limiting the procedural rights of criminal defendants, by infringing on the power of the state judiciary to protect California citizens from arbitrary or capricious legislation, and by substantially altering the substance and integrity of the state Constitution as a document of independent force and effect. (52 Cal.3d. at pp. 352-354.)

Petitioners assert the effects of the term and budgetary limitations of Proposition 140 on the Legislature are similarly dramatic, causing far-reaching changes in our basic governmental plan. As they phrase the argument, "Weakened by budget cuts and harsh term limits,

the Legislature will be unable to discharge its traditional duties of policymaker, keeper of the purse, and counterweight to the executive branch in the way the Constitution intends. The result is a change so profound in the structure of our government that it constitutes a revision . . . ."

In petitioners' words, the new term limitations will "virtually guarantee that California will have a new Legislature--that is, a Legislature in which the vast majority of the members are new--every six years." Petitioners note that legislators with "subtantial experience" and valuable "expertise" ultimately will be required to surrender forever their legislative offices, and persons with minimal legislative experience will be appointed chairpersons of major committees. Petitioners predict that the Governor's role in the delicately balanced state governmental process will grow as inexperienced legislators become "susceptible to the subtle pressures of the gubernatorial power of appointment."

Additionally, according to petitioners, the power of special interest groups to defeat legislative programs will be enhanced. Those groups opposing legislation proposed by "lame duck legislators" can merely "wait until they leave to dismantle it." Petitioners suggest that inexperienced legislators, lacking any background in "dealing with the budget" or "dealing with each other,"will be greatly hindered in their ability to review and pass a satisfactory state budget. They note that several legislators currently serving on key budget committees have done so for periods far in excess of the terms now permitted by Proposition 140.

As for the budgetary limitations imposed by Proposition 140, petitioners observe that the new measure will force a substantial reduction in the funds available for compensating legislators and their staffs, and defraying legislative operating expenses. Approximately $176 million was appropriated for the Legislature for the 1990-1991 fiscal year, but under Proposition 140 only $114 million would be appropriated for the current fiscal year, resulting in a substantial reduction in funds. As the Legislative Analyst explained in the voters' ballot pamphlet, "In 1991-92, expenditures by the Legislature would be reduced by about 38 percent, or $70 million." (Ballot Pamp., *supra*, at p. 69.)

According to petitioners, and undisputed by respondents, in anticipation of the forthcoming budgetary reduction, "as of March 1, 1991, more than 640 employees will have left the Legislature as a result of Proposition 140." For the current fiscal year, "all [Senate] standing committee budgets will be reduced by 20% and all subcommittees and select committees will be eliminated. . . . The Assembly expects to have to take similar steps."

Petitioners note that among those departing from the Legislature are experienced consultants previously hired to provide accurate information concerning proposed or pending legislation. Petitioners predict the Legislature will become "an essentially reactive body," dependent on lobbyists and special interest groups as a source of information, and lacking sufficient funds to develop its own "legislative agenda."

After we granted review in this matter, petitioners sought a stay of the budgetary limitation provisions of

Proposition 140, claiming that the offices of Legislative Analyst and Auditor General would be jeopardized unless a stay were granted prior to June 15, 1991, when the proposed budget for the forthcoming fiscal year must be sent to the Governor. (Cal. Const., art. IV, § 12, subd. (c).) Although intervener suggested that petitioners' request amounted to mere "gamesmanship" designed to lend support to their revision challenge, as previously indicated we issued a temporary stay pending our review of the issues.

As previously noted, petitioners contend that the combined effects of the foregoing term and budgetary limitations on California's "basic governmental plan" will be as devastating and far reaching as those involved in the provision of Proposition 115 invalidated by us in *Raven v. Deukmejian, supra,* 52 Cal.3d 336. They thus assert that Proposition 140 has achieved a qualitative revision of the Constitution. We disagree.

First, the basic and fundamental structure of the Legislature as a representative branch of government is left substantially unchanged by Proposition 140. Term and budgetary limitations may affect and alter the particular legislators and staff who participate in the legislative process, but the process itself should remain essentially as previously contemplated by our Constitution. This aspect distinguishes the present case from *Raven,* in which we struck down a provision that would have fundamentally changed and subordinated the constitutional role assumed by the judiciary in the governmental process. (See also *Amador, supra,* 22 Cal.3d 208, 223 [posing hypothetical example of provision vesting all judicial power in Legislature].)

As indicated in *Raven*, a qualitative revision includes one that involves a change in the basic plan of California government, i.e., a change in its fundamental structure or the foundational powers of its branches. (*Raven, supra*, 52 Cal.3d at pp. 352-355.) *Raven* invalidated a portion of Proposition 115 because it deprived the state judiciary of its foundational power to decide cases by independently interpreting provisions of the state Constitution, and delegated that power to the United States Supreme Court. (*Ibid.*)

By contrast, Proposition 140 on its face does not affect either the structure or the foundational powers of the Legislature, which remains free to enact whatever laws it deems appropriate. The challenged measure alters neither the content of those laws nor the process by which they are adopted. No legislative power is diminished or delegated to other persons or agencies. The relationships between the three governmental branches, and their respective powers, remain untouched.

Second, although the immediate foreseeable effects, of the foregoing term and budgetary limitations are indeed substantial (primarily, the eventual loss of experienced legislators and some support staff), the assertedly momentous consequences to our governmental scheme are largely *speculative* ones, dependent on a number of as yet unproved premises.

Petitioners assume, for example, that the eventual loss of experienced legislators, and the arrival of their relatively unseasoned replacements, will irreparably hinder and damage the legislative process. Yet respondents argue with equal conviction that Proposition 140's term

limitations will free the entire process from the control of assertedly entrenched, apathetic, veteran incumbents, thereby allowing fresh creative energies to flourish free of vested, self-serving legislative interests. Respondents also note that the office of Governor is likewise subject to the limitation of two terms under Proposition 140, thus lessening the likelihood that the Legislature will become a subordinate branch.

In similar fashion, whereas petitioners forecast bleak consequences from the budgetary limitations and consequent loss of experienced support staff, respondents assume the monetary restraints will contribute in a positive manner toward eliminating excessive legislative spending and terminating surplus or inefficient personnel.

Petitioners view these budgetary limitations as akin to infringements on the Legislature's inherent "power of self-preservation" as an independent branch of government. (See *Millholen v. Riley* (1930) 211 Cal.29, 33-34 [293 P.69]; see also *Brown v. Superior Court* (1982) 33 Cal.3d 242, 248, fn. 5 [188 Cal.Rptr. 425, 655 P.2d 1260].) In petitioners' words, "a 38% reduction in funds for the Legislature threatens the functioning of that branch and alters the structure of government." Respondents, on the other hand, assert that the remaining budget allocation (nearly $1 million per legislator for the current fiscal year) is more than ample to provide an effective and efficient legislative staff.

Intervener declares that the Legislature's budget has increased 838 percent during the period from 1968 to 1990, while the Governor's budget increased only

417 percent during this same period. Thus, even after the 38 percent budget cut attributable to Proposition 140, the Legislature's budget will have increased at a substantially greater rate than the Governor's budget over the last 22 years.

We are in no position to resolve the controversy between the parties regarding the long-term consequences of Proposition 140, for the future effects of that measure on our "basic governmental plan" are simply unfathomable at this time. Indeed, that very uncertainty inhibits us from holding that a constitutional revision has occurred in this case. Our prior decisions have made it clear that to find such a revision, it must *necessarily or inevitably appear from the face* of the challenged provision that the measure will substantially alter the basic governmental framework set forth in our Constitution. (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 261 [186 Cal.Rptr. 30, 651 P.2d 274] [rejecting argument that Prop. 8 (see Cal. Const., art. I, § 28) involved improper constitutional revision]; *id.*, at pp. 258-259 [rejecting argument that Prop. 8 would improperly cause impairment of essential governmental functions]; *Amador, supra*, 22 Cal.3d at pp. 224-226 [nothing on face of Prop. 13 (see Cal. Const., art. XIII A) "necessarily and inevitably" would result in loss of home rule]; see *Raven v. Deukmejian, supra*, 52 Cal.3d at p. 349 ["nothing on the face of the challenged measure's [Prop. 115] 'necessarily or inevitably' compels" dire economic consequences predicted by petitioners in context of single-subject rule challenge].)

In *Amador*, we considered and rejected a similar revision challenge based on the predicted dire economic consequences to home rule in California arising from the

property tax limitations of Proposition 13. We recognized the potential "limiting effect" on local government that would result from the substantial reduction in tax revenues contemplated by the measure, but we concluded that such economic consequences were insufficient to accomplish a constitutional revision. (22 Cal.3d at p. 225.)

Similarly, in *Brosnahan v. Brown, supra,* 32 Cal.3d at page 261, we observed that "petitioners' forecast of judicial and educational chaos is exaggerated and wholly conjectural, based primarily upon essentially unpredictable fiscal or budgetary constraints." In the present case, petitioners' prediction that Proposition 140 will "profoundly alter the Legislature's ability to perform its constitutional functions," seems similarly conjectural and speculative. The same objection disposes of petitioners' suggestion, raised only in a footnote, that Proposition 140 may threaten to "impair essential governmental functions" (see *Brosnahan v. Brown, supra,* 32 Cal.3d at pp. 258-260), or to "radically undercut[] representative democracy" (see *Amador, supra,* 22 Cal.3d at pp. 227-228).

Petitioners assert that, from an historical standpoint, changes similar in nature to Proposition 140 have been achieved only through formal constitutional revisions. They note that in 1878, as a result of convening a constitutional convention, provisions were adopted that "reduced the Legislature from a full-time body to one that met only biennially and then was only allowed to be paid for sixty days. . . . That system prevailed until 1966, when the Constitution was revised a second time and the Legislature once again became a full-time body." According to petitioners, any such changes "could only have been done as part of a revision."

Of course, the fact that a particular constitutional change was adopted at a constitutional convention does not necessarily indicate the change was a revision. Mere amendments may also be adopted during the course of such proceedings. But the main difficulty with petitioners' argument in this regard is that its acceptance could, as a practical matter, insulate the Legislature from any severe reform measures directed at that branch and initiated by the people, because proceedings to adopt constitutional revisions must be initiated by a two-thirds vote of both houses *of the Legislature*. (Cal. Const., art. XVIII, §§ 1, 2.) To hold that reform measures such as Proposition 140, which are directed at reforming the Legislature itself, can be initiated only with the Legislature's own consent and approval, could eliminate the only practical means the people possess to achieve reform of that branch. Such a result seems inconsistent with the fundamental provision of our Constitution placing "[a]ll political power" in the people. (*Id.*, art. II, § 1.) As that latter provision also states, "Government is instituted for [the people's] protection, security, and benefit, *and they have the right to alter or reform it* when the public good may require." (Italics added.)

It seems indisputable that Proposition 140 represents an attempt by the people to "alter or reform" their own government. To construe article XVIII as vesting the Legislature with a power to veto such reform measures would be seriously inconsistent with the democratic principles expressed in article II. If, as petitioners predict, Proposition 140 ultimately produces grave, undesirable consequences to our governmental plan, the Legislature (Cal. Const., art. XVIII, § 1) or the people (*id.*, art. XVIII,

§ 3) are empowered to propose a new constitutional amendment to correct the situation. Resolving, as we must, all doubts in favor of the initiative process, we conclude that nothing on the face of Proposition 140 effects a constitutional revision.

C. *The Single-subject Requirement*

Petitioners next contend that Proposition 140 violates the single-subject provision (Cal. Const., art. II, § 8, subd. (d)), by combining in a single measure such "disparate" subjects as term and budgetary limitations and pension restrictions. We disagree.

The principles that guide our resolution of the issue are well settled: "'[A]n initiative measure does not violate the single-subject requirement if, despite its varied collateral effects, *all of its parts are "reasonably germane"* to each other,' and to the general purpose or object of the initiative. [Citations.]" (*Brosnahan v. Brown, supra,* 32 Cal.3d at p. 245; see also *Raven v. Deukmejian, supra,* 52 Cal.3d at p. 346, and cases cited.)

In the two foregoing cases, we upheld separate crime reform initiatives (Propositions 8 and 115) against single-subject challenges, even though each initiative contained widely disparate procedural and substantive provisions. We observed that the various elements of each of these initiatives united to form a comprehensive criminal justice reform package with one single unifying theme: promoting the rights of actual and potential crime victims. (See *Raven v. Deukmejian, supra,* 52 Cal.3d at p. 347; *Brosnahan v. Brown, supra,* 32 Cal.3d at p. 247.)

In *Brosnahan*, we admonished that the single-subject rule "obviously forbids joining disparate provisions which appear germane only to topics of excessive generality such as 'government' or 'public welfare.' " (32 Cal.3d at p. 253.) We continued by referring to our "liberal interpretative tradition . . . of sustaining statutes and initiatives which fairly disclose a reasonable and common sense relationship among their various components in furtherance of a common purpose." (*Ibid.*)

The unifying theme or common purpose of Proposition 140 is incumbency reform, a subject not excessively general when compared with prior measures upheld by this court. (See also *Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 43 [157 Cal.Rptr. 855, 599 P.2d 46] [reasonably germane subject of "political practices"]; *Amador, supra*, 22 Cal.3d at p. 231 [valid subject of "property tax relief"]; cf. *Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1097, 1100 [240 Cal.Rptr. 569, 742 P.2d 1290] [invalid subjects of "fiscal affairs" and "statutory adjustments"].)

The present measure's introductory statement declares that an "extremely high number of incumbents" are reelected by reason of "The ability of legislators to serve unlimited number of terms, to establish their own retirement system, and to pay for staff and support services at state expense . . . . " (Cal. Const., art. IV, § 1.5.) The declared purpose of Proposition 140 is "To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office," by limiting "the powers of incumbency." (*Ibid.*)

Petitioners observe that Proposition 140 is broader than mere reform of the legislative branch, because the

measure imposes term limitations on various constitutional officers as well as legislators. Moreover, petitioners dispute the idea that reducing or limiting legislators' pension rights could effectively assist in achieving incumbency reform. In their view, reducing state contributions to the Legislators' Retirement System would not eliminate any true advantage incumbents possess over challengers. Petitioners suggest the topic of pension reductions falls into the separate category or subject of "reducing expenditures."

Petitioners appear to be confusing germaneness with functional relationship. As we have previously held, the single-subject provision does not require that each of the provisions of a measure effectively interlock in a functional relationship. (See *Brosnahan v. Brown, supra,* 32 Cal.3d at pp. 248-249.) It is enough that the various provisions are reasonably related to a common theme or purpose. (*Id.*, at pp. 246-248; see *Raven v. Deukmejian, supra,* 52 Cal.3d at pp. 347-348.)

The framers of Proposition 140 evidently believed that "the powers of incumbency" could be reduced or checked by making an extended career in public office both less available and less attractive to incumbent legislators, through term and budgetary limitations as well as reduced pension benefits. Budgetary reductions may have been deemed necessary to reduce the advantages incumbents possess vis-a-vis other candidates, as discussed in part D, *post.* As for limited pension benefits, the measure expressly states that the limitation was appropriate because service in the Legislature is no longer "intended as a career occupation." (Cal. Const., art. IV, § 4.5.) The framers presumably did not believe budgetary

or pension limitations were needed with respect to the other constitutional officers subject to the term limitations of the measure.

Whether or not these various provisions are wise or sensible, and will combine *effectively* to achieve their stated purpose, is not our concern in evaluating the present single-subject challenge. (See *Amador, supra,* 22 Cal.3d at p. 219 ["We do not consider or weigh the economic or social wisdom or general propriety of the [property tax] initiative. Rather, our sole function is to evaluate [the measure] legally in the light of established constitutional standards."]; see also *CalFarm Ins. Co. v. Deukmejian, supra,* 48 Cal.3d at pp. 841-842 [single-subject rule does not require determination whether each section effectively will further the measure's overall purpose]; *In re Lance W., supra,* 37 Cal.3d at p. 887 [wisdom of Prop. 8 irrelevant to constitutional challenge]; *Brosnahan v. Brown, supra,* 32 Cal.3d at p. 248 [same].) Sensible or not, the separate aspects of Proposition 140 relate to the furtherance of a common purpose.

We conclude that the various provisions of Proposition 140 are reasonably germane to the single subject of incumbency reform.

D. *Effect on Voting and Candidacy Rights*

Petitioners next assert that the term limitations of Proposition 140 violate the First and Fourteenth Amendments of the federal Constitution. They observe that under Proposition 140, as previously discussed, once the prescribed maximum terms have expired, office holders are forever barred from running for the office they held.

According to petitioners, this lifetime ban substantially burdens two fundamental rights, namely, the right to vote and the right to be a candidate for public office. Petitioners, urging "strict scrutiny" of the new measure, suggest that no "compelling state interest" supports such a lifetime ban. (See *Eu v. San Francisco Democratic Com.* (1989) 489 U.S. 214, 222 [103 L.Ed.2d 271, 281, 109 S.Ct. 1013] [hereafter *Eu*]; *Johnson v. Hamilton* (1975) 15 Cal.3d 461, 466-468 [125 Cal.Rptr. 129, 541 P.2d 881] [applying strict scrutiny to review constitutionality of candidates' durational residence requirement].)

Respondents, on the other hand, assert the measure is valid under the balancing test announced in *Anderson v. Celebrezze* (1983) 460 U.S. 780 [75 L.Ed.2d 547, 103 S.Ct. 1564], discussed below. Respondents, noting certain mitigating aspects of the measure, contend that the public policy served by Proposition 140 is both rational and compelling, having only minimal effects on voting or candidacy rights. We first turn to the question of the proper standard for resolving petitioners' challenge.

Because Proposition 140 amends the California Constitution itself, it is appropriate that we look to the decisions of the United States Supreme Court for guidance in determining the validity of the measure under the federal Constitution. We have observed that "[i]n analyzing constitutional challenges to election laws, this court has followed closely the analysis of the United States Supreme Court. [Citations.] [¶] The high court has generally addressed the validity of election regulations under the equal protection clause. However, the basis for court's selection of that approach and the precise nature of the equal protection tests employed has not always been easily discernible. And, as is true for equal protection

doctrine in general, the standard of review utilized in voting and election cases has been in a state of flux. [Citations.]" (*Canaan v. Abdelnour* (1985) 40 Cal.3d 703, 710-711 [221 Cal.Rptr. 468, 710 P.2d 268, 69 A.L.R.4th 915]; see also *Munro v. Socialist Workers Party* (1986) 479 U.S. 189, 200-201 [93 L.Ed.2d 499, 509-510, 107 S.Ct. 533] [dis. opn. of Marshall, J., observing majority's failure to articulate appropriate level of scrutiny for appraising validity of restrictions on ballot access].)

Petitioners assume that a "compelling interest" standard is required by *Eu, supra,* in which the justices unanimously invalidated California's prohibition on primary endorsements by political parties. To the contrary, it seems clear the high court in *Eu* imposed such a strict standard because of the serious impact on First Amendment freedoms of speech and association, interests not as directly impacted by Proposition 140, which does not affect speech interests and which impacts all political parties on an equal basis. (See 489 U.S. at pp. 222-225 [103 L.Ed.2d at pp. 281-283].) As *Eu* concluded, "Because the ban [on endorsements] burdens appellees' rights to free speech and free association, it can only survive constitutional scrutiny if it serves a compelling governmental interest." (*Id.* at p. 225 [103 L.Ed.2d at P. 283], fn. omitted.) Thus, *Eu* is probably inapposite. (See also *Clements v. Fashing* (1982) 457 U.S. 957, 963 [73 L.Ed.2d 508, 515-516, 102 S.Ct. 2836] [plurality opinion stating barriers to candidate's access to ballot do not compel close scrutiny]; *Erum v. Cayetano* (9th Cir. 1989) 881 F.2d 689, 692, fn. 7 [discussing *Eu,* but concluding that in cases involving restrictions on ballot access "heightened scrutiny is not the rule"].) In any event, as will appear, it is unlikely we

would reach a different result applying strict scrutiny to evaluate Proposition 140.

In *Rodriguez v. Popular Democratic Party* (1982) 457 U.S. 1 [72 L.Ed.2d 628, 102 S.Ct. 2194], the court considered the constitutional validity of Puerto Rico's system of allowing only certain designated political parties access to the vote needed to fill legislative vacancies on an interim basis. In another unanimous opinion, the court noted that the federal Constitution does not specify the procedure a state must use in filling legislative vacancies (*id.*, at p. 8 [72 L.Ed.2d at p. 634]), that the Constitution does not compel a fixed method of choosing state or local officers or representatives (*id.*, at p. 9 [72 L.Ed.2d at p. 635]), that the right to vote for state offices is not a constitutionally protected right (*ibid.*), but that once a state or commonwealth provides for elected representatives, a citizen has a constitutional right to participate on an equal basis with other citizens (*id.*, at p. 10 [72 L.Ed.2d at p. 635]).

Rodriguez v. Popular Democratic Party, supra, 457 U.S. 1, indicates the high court will give wide latitude to state election laws, even those that may restrict the electorate's choice of representatives, so long as those laws are applied in an even-handed manner without discriminating against particular citizens or classes of citizens. The incumbency limitations involved here satisfy that standard. (See also *Burdick v. Takushi* (9th Cir. 1991) 927 F.2d 469, 473-474 [voters have no constitutional right to vote for particular candidate]; *Stiles v. Blunt* (8th Cir. 1990) 912 F.2d 260, 266, fn. 10, cert. den. (1991) ___U.S.___ [113 L.Ed.2d 241, 111 S.Ct. 1307] [same]; *Zielasko v. State of Ohio* (6th Cir. 1989) 873 F.2d 957, 961 [same]; but see *Caanan v. Abdelnour, supra,* 40 Cal.3d at p. 713.)

In *Canaan v. Abdelnour, supra,* 40 Cal.3d 703, we struck down a city's blanket prohibition against write-in voting in municipal elections. In so doing, we applied the balancing test set forth in *Anderson v. Celebrezze, supra,* 460 U.S. 780, wherein the court held unduly burdensome an Ohio law requiring independent candidates for the November 1980 Presidential Election to file their statements of candidacy by March of that year. The high court in *Anderson,* acknowledging that a state's regulatory interests in determining the eligibility of candidates "are generally sufficient to justify reasonable, nondiscriminatory restrictions" (*id.,* at p. 788 [75 L.Ed.2d at p. 557], fn. omitted), announced the following test:

"Constitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions. [Citations.] Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it must also consider the extent to which those interest make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. [Citations.] The results of this evaluation will not be automatic; as we have recognized, there is 'no substitute for the hard judgments that must be made.'

[Citations.]" (460 U.S. at pp. 789-790 [75 L.Ed.2d at p. 558].)

With respect to *Anderson's* requirement of showing the "necessity" of the particular burden imposed by the state, we must also consider whether there are any less drastic alternatives to a lifetime ban. (See *Anderson v. Celebrezze, supra,* 460 U.S. at p. 806 [75 L.Ed.2d at p. 568]; *Canaan v. Abdelnour, supra,* 40 Cal.3d 703, 719, fn. 13.)

Thus, *Anderson v. Celebrezze, supra,* 460 U.S. 780, requires us to consider three separate elements in ascertaining the constitutionality of state laws restricting access to the ballot: (1) the nature of the injury to the rights affected, (2) the interests asserted by the state as justifications for that injury, and (3) the necessity for imposing the particular burden affecting the plaintiff's rights, rather than some less drastic alternatives. Lacking any more specific guidance from the high court, we now apply *Anderson's* balancing test to the challenged provisions of Proposition 140.

1. *Character and Extent of Injury to Protected Rights*

Two important rights are affected by Proposition 140, namely, the incumbent's right to run for public office, and the voters' right to reelect the incumbent to that office. Consequently, the "injury" to those rights resulting from the application of Proposition 140 is also two fold, namely, lifetime exclusion of the incumbent from the office previously held, and a corresponding permanent inability of the voters to return the incumbent to that office.

a. *Effect on Candidates*

As previously explained, Proposition 140 imposes a lifetime ban on legislators once they have completed the maximum number of terms. Petitioners argue, "In the long run, the term limitations permanently ban those who are arguably the most qualified candidates—incumbents with the experience and expertise in the legislative process necessary to the most effective representation of their constituencies." According to petitioners, qualified incumbents will be "purged" solely to seat "massive numbers" of inexperienced "newcomers." Petitioners predict that only a few qualified persons will be attracted to short term public office.

Respondents, of course, dispute petitioners' premise that long-term legislators are inevitably better qualified than other candidates, and they believe that term limitations will encourage, rather than inhibit, new qualified candidates seeking short term public service. They characterize the term limitations of Proposition 140 as additional candidacy requirements, akin to age, integrity, training or residency, which have generally been upheld. (See, e.g., *Zeilenga v. Nelson* (1971) 4 Cal.3d 716, 721 [94 Cal.Rptr. 602, 484 P.2d 578]; 25 Am.Jur.2d, Elections, § 175, pp. 870-871, and cases cited; Note, *Developments in the Law: Elections* (1975) 88 Harv.L.Rev. 1111, 1217 et seq.)

Respondents also stress three features of Proposition 140 that assertedly serve to mitigate the severity of its lifetime ban: First, the affected incumbent is not barred from seeking any other public office, including a seat in another legislative house or a statewide constitutional

office. A former Senator may seek a seat in the Assembly, and vice versa. Second, the term limitations arise only after the incumbent already has had the opportunity to serve a significant period in office (i.e., eight years for a Senator, and six years for a member of the Assembly). Finally, the term limitations are generally applicable to persons elected or appointed on or after November 6, 1990. Except for some incumbent Senators, past terms served do no count in calculating the limitation. Thus, by the time the term limitations of Proposition 140 come into play, the incumbent will have already served, and indeed may continue to serve, several terms in public office.

b. *Effect on Voters*

Petitioners also stress the impact on the voters who are prevented from casting their ballots for the particular candidate of their choice. Just as incumbent legislators are permanently barred from running for another term once they have served the prescribed numbers of terms, the voters are permanently barred from voting for such persons, at least for the legislative office they once held. According to petitioners, the voters thus will be denied the right to vote for those persons who arguably possess the best qualifications.

Additionally, petitioners note that because Proposition 140 was adopted on a statewide basis, "the disability [on candidates and voters] is imposed not by those who have the right to vote for the candidate, but rather by those outside the district." Petitioners thus suggest the resulting impact on or injury to the voters is aggravated or enhanced by reason of the ability of voters residing

outside a particular voting district to essentially "veto" particular candidates within that district.

Respondents reply by citing federal court cases (e.g., *Burdick v. Takushi, supra,* 927 F.2d 469, 473-474) stating that voters have no constitutional right to vote for particular candidates. Additionally, respondents observe that the challenged measure does not fall into any of the categories of prior cases in which the right to vote was found impermissibly infringed. No identifiable groups of voters are excluded from voting or otherwise unduly burdened in the exercise of their franchise. Characterizing the term limitations of Proposition 140 as additional candidacy qualifications akin to age or residency, respondents submit that Proposition 140 does not truly impair the franchise, for the voters retain the basic fundamental right to cast their ballots for the *qualified* candidate of their choice.

Moreover, respondents observe that neither voter choice nor candidate eligibility is restricted based on the content of protected expression, political affiliation, or inherently arbitrary factors such as race, religion or sex. The only criterion used is incumbency. Voters retain the ability to vote for any qualified candidate holding the beliefs or possessing the attributes they may desire in a public officeholder. Under these circumstances, First Amendment protection of political expression and promotion of the marketplace for ideas continue unabated.

Respondents further note that petitioners have cited no case supporting their theory that a voting restriction on "local" offices would be invalid if imposed by voters

on a statewide basis. Indeed, such a rule would seemingly call in question *any* statewide legislation affecting the qualification of candidates for local elections, such as age or residency requirements.

Finally, respondents suggest that because Proposition 140 was an initiative measure adopted by the people at a statewide election, any resulting injury to the exercise of the franchise should be deemed self-inflicted, and thus not constitutionally protected.

c. *Summary of Impact on Candidates and Voters*

In sum, although Proposition 140 does affect the rights of voters and candidates to a degree, there are several mitigating aspects, including the voters' continued right to vote for any qualified candidates, as well as the candidates' ability to run for other public offices, their entitlement to a significant period of service in office before the term limitations apply, and the "prospective" application of the limitation provision. Additionally, we should bear in mind that it is presently unclear under federal law whether and to what extent voters retain a constitutional right to vote for particular candidates such as the incumbent legislators affected by the challenged measure. Thus, the *legal* impact of Proposition 140 on the voters remains uncertain.

Having discussed the extent of the "asserted injury to the rights protected" (*Anderson v. Celebrezze, supra,* 460 U.S. at p. 789 [75 L.Ed.2d at p. 558]), we next analyze the "precise interests put forward by the State as justifications for the burden imposed by its rule" (*ibid.*).

2. *The Interests of the State*

Balanced against the foregoing negative impact on candidates and voters flowing from the challenged measure are the considerable state interests assertedly promoted thereby. In the words of new article IV, section 1.5, of the state Constitution, term limitations are deemed necessary to restore "free, fair, and competitive elections," to "encourage qualified candidates to seek public office," and to eliminate "unfair incumbent advantages" that have resulted in an "extremely high number of incumbents" and created "a class of career politicians" instead of the "citizen representatives envisioned by the Founding Fathers."

According to respondents, the state's interests in limiting incumbency should support measures considerably stronger than a mere temporary disability from holding office. As respondents argue, the state's strong interests in protecting against an entrenched, dynastic legislative bureaucracy, and in thereby encouraging new candidates to seek public office, are both legitimate and compelling ones that support a lifetime ban from the office and outweigh any interest the incumbent legislators, or the voting public, may have in perpetuating the incumbents' positions of control.

The legitimacy of the foregoing asserted state interests in limiting incumbency are well recognized in analogous contexts. As stated by the West Virginia Supreme Court of Appeals in rejecting a similar challenge to a state constitutional amendment limiting the right of the Governor to seek a third consecutive term, "Constitutional

restrictions circumscribing the ability of incumbents to succeed themselves appear in over twenty state constitutions, and exist in the Twenty-second Amendment to the *Constitution of the United States* with regard to the Presidency. The universal authority is that restriction upon the succession of incumbents serves a rational public policy and that, while restrictions may deny qualified men an opportunity to serve, as a general rule the over-all health of the body politic is enhanced by limitations on continuous tenure. [Citations and fn. omitted]." (*State ex rel. Maloney v. McCartney* (1976) 159 W.Va. 513 [223 S.E.2d 607, 611] [hereafter *Maloney*], app. dism. *sub nom. Moore v. McCartney* (1976) 425 U.S. 946 [48 L.Ed.2d 190, 96 S.Ct. 1689]; see *Maddox v. Fortson* (1970) 226 Ga. 71 [172 S.E.2d 595, 598-599], cert. den. 397 U.S. 149 [25 L.Ed.2d 183, 90 S.Ct. 999]; cf. Chemerinsky, *Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency* (1988) 49 Ohio St. L.J. 773 et seq.; Tribe, American Constitutional Law (2d ed. 1988) § 13-18, at p. 1097 ["Democracy envisions rule by successive temporary majorities. The capacity to displace incumbents in favor of the representatives of a recently coalesced majority is, therefore, an essential attribute of the election system in a democratic republic."]; cf. Annot. (1958) 59 A.L.R.2d 716 [construction and effect of incumbency limitation laws].)

The *Maloney* decision continues by describing at length the substantial reasons for limiting the right of incumbents to succeed themselves. These include "The power of incumbent officeholders to develop networks of patronage and attendant capacities to deliver favorably disposed voters to the polls," "fears of an entrenched political machine which could effectively foreclose access

to the political process," and the belief that regularly disrupting those "machines" "would stimulate criticism within political parties" and "insure a meaningful, adversary, and competitive election." (223 S.E.2d at p. 611.)

In addition, *Maloney* explains that "it has long been felt that a limitation upon succession of incumbents removes the temptation to prostitute the government to the perpetuation of a particular administration. [Citation.] . . . Meretricious policies which sacrifice the well-being of economic, social, racial, or geographic minorities are most likely where a political figure, political party, or political interest group can rely upon electorate inertia fostered by the hopelessness of encountering a seemingly invincible political machine." (223 S.E.2d at pp. 611-612.)

Petitioners observe that *Maloney* involved a limitation on *consecutive* terms of a *Governor*, rather than a lifetime ban on incumbent legislators. They suggest that term limitations on the executive branch are justified by the need to check the substantial concentration of power that the chief executive possesses, a consideration assertedly not applicable to the legislative branch. But we think that many, if not all, of the considerations mentioned in *Maloney* (e.g., eliminating unfair incumbent advantages, dislodging entrenched political machines, restoring open access to the political process, and stimulating electorate participation) would apply with equal force to the legislative branch.

In connection with petitioners' argument that Proposition 140's lifetime ban is unconstitutional, two other cases are instructive, though factually distinguishable. In *Clements v. Fashing*, *supra*, 457 U.S. 957, cited with apparent approval in *Anderson v. Celebrezze*, *supra*, 460 U.S.

at page 789, footnote 9 [75 L.Ed.2d at page 558], the high court upheld the validity of a Texas statute that rendered incumbent justices of the peace ineligible for the Texas Legislature. The disability from office extended only during the term for which the justices were elected or appointed. A plurality of the high court took the position that barriers to a candidate's access to the ballot do not compel close scrutiny (457 U.S. at p. 963 [73 L.Ed.2d at p. 516]), and stressed the "de minimis" nature of the restriction, noting that the act merely imposed a brief "waiting period" on current officeholders, and therefore could be sustained by a mere showing of some "rational predicate" to support it (*id.* at pp. 967-968 [73 L.Ed.2d at pp. 518-519]).

The *Clements v. Fashing* plurality did not affirmatively indicate that a lifetime bar to legislative service necessarily would be invalid. Significantly, unlike Proposition 140, the Texas act apparently was not aimed at limiting the powers of incumbency, but was based on the "rational predicate" that an affected justice will be less inclined to abuse his position or neglect his duties because of the justice's aspirations for higher office. (457 U.S. at p. 968 [73 L.Ed.2d at p. 519].)

In *De Bottari v. Melendez* (1975) 44 Cal.App.3d 910 [119 Cal.Rptr. 256], the Court of Appeal struck down a local ordinance prohibiting *recalled* council members from running for city council within a year of the recall. Although petitioners believe the case supports their position, closer scrutiny indicates otherwise. Finding the candidacy restriction too severe, the *De Bottari* court observed, "Cases in other jurisdictions upholding limitations on successive terms in office [citations] involve similar restrictions but are not authoritative here since

such limitations serve totally *different governmental interests.*" (44 Cal.App.3d at p. 913, fn. 1, italics added.) *De Bottari,* using strict scrutiny, reviewed the interests that assertedly supported a temporary ban on candidacy by *recalled* candidates and found them insufficient to sustain the restriction. The court had no occasion to review the "different" interests served by general limitations on incumbency, as outlined by *Maloney, supra.*

In sum, despite its distinguishing features, we conclude that *Maloney's (supra,* 223.S.E.2d 607) analysis is quite pertinent to our determination whether permanent incumbency limitations are supported by legitimate and compelling considerations. We conclude they are so supported.

3. *Necessity of Imposing Restrictions*

We turn next to the "necessity" of imposing the restrictions of Proposition 140 on the dual rights at issue here (see *Anderson v. Celebrezze, supra,* 460 U.S. at pp. 789-790 [75 L.Ed.2d at pp. 558-559]). Petitioners contend that a lifetime ban on candidacy was unnecessary, and that other less "drastic" alternatives, such as a limitation on consecutive terms, together with additional restrictions on campaign contributions to legislators, decreased fringe and pension benefits, and additional incentives for early retirement, would have been sufficient to promote and accomplish the state interests previously discussed.

As will appear, we conclude that the less drastic alternatives suggested by petitioners would have been inadequate to accomplish the declared purpose of Proposition 140 to eliminate the "class of career politicians" that assertedly had been created by virtue of the "unfair

incumbent advantages" referred to in that measure. (Cal. Const., art. IV, § 1.5.)

Respondents stress the substantial advantages incumbent legislators enjoy in this state, advantages that permitted 92 percent of all incumbents to win reelection at this state's November 1990 General Election. Indeed, respondents note that nine of these incumbents ran unopposed.

Respondents seem correct in this regard. Whether by reason of superior fund raising ability, greater media coverage, larger and more experienced staffs, greater name recognition among the voters, favorably drawn voting districts, or other factors, incumbents do indeed appear to enjoy considerable advantages over other candidates. (See *Service Employees v. Fair Political Practices Comm.* (E.D.Cal. 1990) 747 F.Supp. 580, 588; *Watson v. Fair Political Practices Com.* (1990) 217 Cal.App.3d 1059, 1074 [266 Cal.Rptr. 408], & fn. 13.) As Proposition 140's introductory statement indicates, the framers of the measure believed these substantial advantages of incumbency were unfair to other candidates and tended to create "a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers." (Cal. Const., art. IV, § 1.5.)

Petitioners suggest that a more reasonable alternative existed to the measure's lifetime ban: disqualification of the incumbent for the forthcoming term, thus "forcing the legislator to take one term off, before being eligible to run for the body." Yet, as respondents observe, the framers

reasonably could conclude that a lifetime ban was necessary to assure that a former office holder could not reinvoke at least some of the advantages of incumbency to gain reelection after leaving office for a term or more.

Additionally, we believe the framers might well have reasonably concluded that a mere ban on consecutive terms could encourage popular "career politicians" to trade terms with each other, or to attempt to arrange for a "caretaker" candidate, such as a spouse or relative, to hold office for them during the interrupted term. For example, when in 1966 George Wallace became legally ineligible to run for reelection as Governor of Alabama because of state term limitations applicable to that office, his wife, Lurleen, successfully ran in his place, and served as Governor until her death in 1968. George Wallace was reelected as Governor in 1970 and again in 1974. (See 12 The New Encyclopedia Britannica, Micropaedia (15th ed. 1990) Wallace, George C. at p. 467.)

Realistically, only a lifetime ban could protect against various kinds of continued exploitation of the "advantages of incumbency" captured through past terms in office. The remainder of petitioners' suggested "alternatives" essentially involve narrow changes in the system of providing contributions or compensation for legislators, changes that would afford "career politicians" with independent resources little incentive to voluntarily terminate public service.

4. *Conclusion*

On balance, we conclude the interests of the state in incumbency reform outweigh any injury to incumbent

office holders and those who would vote for them. As *Maloney* observed (223 S.E.2d at p. 612), no decisions of the United States Supreme Court have been found that suggest a limitation on incumbency would be unconstitutional. Although such limitations may restrict the franchise (but see cases indicating voters have no right to vote for particular candidates, e.g., *Burdick v. Takushi, supra,* 927 F.2d 469, 473-474), if we use a balancing test that weighs "the enlargement of the franchise by guaranteeing competitive primary and general elections" against "incidental disenfranchisement" of some voters, the court "must conclude that restrictive provisions on the succession of incumbents do[ ] not frustrate but rather further [ ] the policy of the Fourteenth Amendment." (*Maloney, supra,* 223 S.E.2d at pp. 612-613.)

It is true, as petitioners observe, that respondents have not offered evidence to support all of the various premises on which Proposition 140 is based. But as the United States Supreme Court pointed out in *Munro v. Socialist Workers Party, supra,* 479 U.S. 189, upholding state restrictions on minority party candidacy, a state need not demonstrate empirically all of the various evils that its regulations seek to combat: "Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." (*Id.*, at pp. 195-196 [93 L.Ed.2d at p. 506].) We have no reason to doubt that the high court would give similar leeway to

state regulations imposed directly by the people through the initiative process.

In sum, it would be anomalous to hold that a statewide initiative measure aimed at "restor[ing] a free and democratic system of fair elections," and "encourag[ing] qualified candidates to seek public office" (Cal. Const., art. IV, § 1.5), is invalid as an unwarranted infringement of the rights to vote and to seek public office. We conclude the legitimate and compelling interests set forth in the measure outweigh the narrower interests of petitioner legislators and the constituents who wish to perpetuate their incumbency.

E. *Bill of Attainder*

Petitioners next assert that Proposition 140 is, in effect, an unlawful bill of attainder. (See U.S. Const., art. I, § 10 ["No state shall . . . pass any bill of attainder . . . . "].) They contend that although the legislative term, budgetary, and pension limitations of Proposition 140 are facially applicable to all current and future incumbent legislators, the measure was nonetheless intended to punish or penalize the current group of incumbent legislators, and especially such long-term incumbents as Assemblyman Willie Brown (elected in 1964), and Senator David Roberti (elected in 1971).

A bill of attainder has been defined as a "legislative *punishment*, of any form or severity, of specifically designated persons or groups" (*United States v. Brown* (1965) 381 U.S. 437, 447 [14 L.Ed.2d 484, 491, 85 S.Ct. 1707] [federal law forbidding Communist Party members from serving as union officers], italics added), or a "legislative

act[ ] . . . that appl[ies] either to named individuals or to easily ascertainable members of a group in such a way as to inflict *punishment* on them without a judicial trial" (*United States v. Lovett* (1946) 328 U.S. 303, 315 [90 L.Ed. 1252, 1259, 66 S.Ct. 1073] [federal legislation terminating compensation for certain federal employees accused of subversive activities], italics added). (See also *Selective Service v. Minn. Public Int. Res. Gp.* (1984) 468 U.S. 841, 851 [82 L.Ed.2d 632, 643, 104 S.Ct. 3348] [bills of attainder involve *punitive* action aimed at identifiable person or group]; *Nixon v. Administrator of General Services* (1977) 433 U.S. 425, 474 [53 L.Ed.2d 867, 910-911, 97 S.Ct. 2777]; *Cummings v. Missouri* (1867) 71 U.S. (3 Cranch.) 277, 320 [18 L.Ed. 356, 362] ["disqualification from office may be punishment" amounting to an improper bill of attainder]; *Crain v. City of Mountain Home*, Ark. (8th Cir. 1979) 611 F.2d 726, 729 [invalidating city ordinances that removed city attorney from office for remainder of term, reduced future salary for the office, and prohibited private practice by such officers]; *Connecticut Judicial Selection Com'n v. Larson* (D.Conn. 1989) 745 F.Supp. 88, 94-96 [upholding act shortening terms of incumbent nonattorney members of judicial selection committee].)

Petitioners point to the following language in the ballot arguments by the measure's proponents: "Proposition 140 will end the reign of the Legislature's powerful officers--the Assembly Speaker (first elected a quarter of a century ago) and the Senate Leader (now into his third decade in the Legislature). . . . " (Ballot Pamp., *supra*, at p. 70.) According to petitioners, the foregoing language (together with more explicit references to Brown and

Roberti in the proponents' campaign literature) makes it clear that Proposition 140 was directed at punishing such long-term legislators as Brown and Roberti, and that accordingly the measure must be deemed an improper bill of attainder under the foregoing cases.

We conclude that petitioners' argument should be rejected. As the high court explained in *Nixon v. Administrator of General Services*, *supra*, 433 U.S. 425, in determining whether particular legislation constitutes a bill of attainder, courts have applied three different tests. We believe the challenged measure meets none of them.

First, an "historical" tests has been used to determine whether the subject legislation imposes a kind of punishment traditionally deemed prohibited by the federal Constitution. (433 U.S. at p. 475 [53 L.Ed.2d at p. 911].) Second, the courts have used a "functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, *reasonably can be said to further nonpunitive legislative purposes*. [Citations.]" (*Id.*, at pp. 475-476 [53 L.Ed.2d at p. 911], italics added and fn. omitted.) Finally, the courts have used a "motivational" test, "inquiring whether the legislative record evinces a congressional intent to punish. [Citations.]" (*Id.*, at p. 478 [543 L.Ed.2d at p. 913].)

Petitioners appear to concede that the historical test is inapplicable here, and we have found no cases involving term limitations as a form of "punishment." As for the functional test, the measure itself expresses broad, *nonpunitive* purposes, namely, "[t]o restore a free and democratic system of fair elections, and to encourage

qualified candidates to seek public office" by limiting "the powers of incumbency." (Cal. Const., art. IV, § 1.5.)

Although petitioners point to the "self-serving" nature of these declarations of intent, we have no reason to dispute the accuracy of their description of the measure's primary intent. As in *Nixon v. Administrator of General Services, supra,* 433 U.S. at page 477 [53 L.Ed.2d at page 912], "Evaluated in terms of these [express congressional] *asserted* purposes, the law plainly must be held to be an act of nonpunitive legislative policymaking." (Italics added.)

Petitioners rely primarily on the motivational test, stressing the framers' express intent to dislodge such long-term incumbents as Brown and Roberti. Petitioners cite the ballot pamphlet arguments of the measure's proponents, which describe these legislators in unflattering terms ("legislative dictators" participating in "Sacramento's web of special favors and patronage"), and urge passage of the measure as a means of ending their long incumbency.

But the ballot arguments contain no indication of an intent to *punish* those individuals for any particular past misconduct. Broad reform measures are frequently prompted by particular acts or circumstances involving specific individuals, but in our view such measures would not constitute improper bills of attainder unless an intent *to punish* such individuals clearly appears from their face, or from the circumstances surrounding their passage.

As stated in *Connecticut Judicial Selection Com'n v. Larson, supra,* 745 F.Supp. at page 96, quoting from an earlier case, " '[i]t is clear that general legislation such as

this . . . *aimed at the office* . . . rather than the incumbent office holders, has none of the objectionable attributes of a bill of attainder. [Citation.]" (Italics added.) Proposition 140 applies with equal force to all state legislators, current and future. Although it is unquestionable the proponents sought to limit the terms of incumbent legislators, including such long-term legislators as Brown and Roberti, we find no evidence of an intent to single out and *punish* those individuals for any supposed misconduct on their part. Accordingly, we conclude that Proposition 140 does not constitute a bill of attainder under the federal Constitution.

F. *Impairment of Contracts*

Finally, petitioners maintain that Proposition 140's limitations on the pension rights of incumbent legislators is unconstitutional as an invalid impairment of contract under the federal Constitution. (U.S. Const., art. I, § 10 ["No state shall . . . pass any . . . law impairing the obligation of contracts . . . ."].)

As previously indicated, new section 4.5 is added to article IV of the state Constitution to provide that although the state will contribute the employer's share to the federal Social Security program on behalf of participating legislators "elected to or serving in the Legislature on or after November 1, 1990," nonetheless "[n]o other pension or retirement benefit shall accrue as a result of service in the Legislature, such service not being intended as a career occupation."

This same provision further provides that "This Section shall not be construed to abrogate or diminish any vested pension or retirement benefit which may have

accrued under an existing law . . . , but upon adoption of this Act no further entitlement to nor vesting in any existing program shall accrue to any such person, other than [federal] Social Security . . . . "

Petitioners assert that, as to incumbent legislators continuing to serve on or after November 6, 1990 (either by reelection to a new term or continuation of a prior term), Proposition 140 constitutes an improper impairment of their "vested" contractual or statutory right to continued participation in the pension program administered by the Legislators' Retirement System (LRS). (See Gov. Code, § 9350 et seq.) In petitioners' view, supported by respondent PERS, incumbent legislators who were members of the LRS immediately prior to November 6, 1990, are entitled to continue to earn pension benefits so long as they remain otherwise qualified to receive such benefits through continued state service. Petitioners (not joined in this respect by PERS) assert similar contract claims on behalf of nonincumbent legislators newly elected on November 6.

1. *Incumbent Legislators*

Petitioners' find ample support for their position in California cases confirming that both the federal and state contract clauses protect the vested pension rights of public officers and employees from unreasonable impairment. See *Allen v. Board of Administration* (1983) 34 Cal.3d 114, 119-120, 124 [192 Cal.Rptr. 762, 665 P.2d 534] [legislators]; *Olson v. Cory* (1980) 27 Cal.3d 532, 540-541 [178 Cal.Rptr. 568, 636 P.2d 532] [judges]; *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863-864 [148 Cal.Rptr.

158, 582 P.2d 614] [state Treasurer]; *Miller v. State of California* (1977) 18 Cal.3d 808, 814-817 [135 Cal.Rptr. 386, 557 P.2d 970] [public employees]; see also *Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131 [287 P.2d 765] [same]; *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-853 [179 P.2d 799] [same].)

Petitioners (joined by respondent PERS) argue that when incumbent legislators first assumed office, they were impliedly promised pension benefits substantially equivalent to those offered by the then-existing provisions of the LRS, and that these benefits included both the primary right to *receive* any vested pension benefits upon retirement (see *City of Long Beach v. Allen* (1956) 143 Cal.App.2d 35, 38-39 [300 P.2d 356]), as well as the collateral right to *earn* future pension benefits through continued service, on terms substantially equivalent to those then offered (see *Carman v. Alvord* (1982) 31 Cal.3d 318, 325 [182 Cal.Rptr. 506, 644 P.2d 192]). Although Proposition 140 by its terms assures that incumbent legislators' right to receive vested pension benefits will not be lost or diminished, the measure also purports to terminate their collateral right to accrue additional benefits through further contributions and continued service to the state.

According to petitioners, the applicable principle is set forth in *Miller v. State of California, supra,* 18 Cal.3d at page 817: "[U]pon acceptance of public employment plaintiff acquired a vested right to a pension based on the system then in effect. That system allowed him to earn successively higher levels of benefits based on his years of service and his highest average salary during three consecutive years." (See also (*Olson v. Cory, supra,* 27 Cal.3d at p. 541; *Betts v. Board of Administration, supra,*

21 Cal.3d at p. 863; *Kern v. City of Long Beach, supra,* 29 Cal.2d at pp. 855-856.) Similar increased benefits from continued service were provided legislators under the LRS. (See Gov. Code, § 9350.)

In response to petitioners' assertions, respondent Eu and intervener first contend that incumbent legislators do not have a vested right under the LRS to continue to accrue pension benefits through continued service. In this regard, they suggest that article IV, section 4, of the state Constitution precludes legislators from acquiring any vested right to continue to earn pension benefits. We disagree.

Article IV, section 4 of the state Constitution, provides in pertinent part that "*The legislature* may, prior to their retirement, limit the retirement benefits payable to Members of the Legislature . . . . " (Italics added.) That provision, seemingly empowering the Legislature to exercise some measure of control over the pension rights of its own members prior to their retirement, may create some uncertainty as to the full amount or extent of a legislator's pension rights during his term of office. But the provision neither states nor implies that these rights are thus deemed inchoate and unprotected from impairment by the initiative process. Significantly, we have never suggested that the mere existence of article IV, section 4, precludes legislators from acquiring pension rights protected by the state or federal contract clauses. (Cf. *Allen v. Board of Administration, supra,* 34 Cal.3d at pp. 119-120.)

Petitioners acknowledge that the state as employer is permitted to make reasonable modifications to the pension system during the employment relationship, so long as employees receive "comparable new advantages" in

return for any substantial reduction in benefits. (*Olson v. Cory, supra,* 27 Cal.3d at p. 541; *Betts v. Board of Administration, supra,* 21 Cal.3d at p. 864; *Allen v. City of Long Beach, supra,* 45 Cal.2d at p. 131.) As we stated in *Olson,* "Although an employee does not obtain any 'absolute right to fixed or specific benefits . . . there [are] strict limitation[s] on the conditions which may modify the pension system in effect during employment.' [Citation.] Such modifications must be reasonable and any ' "changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages." ' [Citation.]" (27 Cal.3d at p. 541.)

Petitioners correctly observe that the pension provisions of Proposition 140 do not merely modify the LRS pension system; rather they *terminate* that system entirely as to additional benefits accruing for future services. Intervener argues that the "transfer" or "redirection" of pension funds to the federal Social Security system operates as a "comparable new advantage" which justifies the impairment and consequently sustains the measure. Petitioners respond by asserting that every legislator already possessed the right to join the federal Social Security system, that 99 out of 120 legislators were already contributing to that system when Proposition 140 was adopted, and that the anticipated federal benefits will be far less than those provided by the LRS. Neither respondent Eu nor intervener has disputed those allegations.

We conclude that incumbent legislators had a vested right to earn additional pension benefits through continued service, despite the potential but unexercised limitations contemplated by article IV, section 4, of the state Constitution. We also conclude that the pension restriction of Proposition 140 must be deemed an impairment,

not a mere "modification" or "adjustment," of the vested pension rights of incumbent legislators.

Respondent Eu and intervener next argue that, assuming an incumbent legislator may acquire such vested rights, a different rule should apply to incumbent legislators who commenced new terms after Proposition 140 became effective. They rely primarily on our decision in *Olson v. Cory, supra*, 27 Cal.3d 532, which had upheld a statute limiting certain cost-of-living increases in judges' salaries after they commenced new terms of office. As *Olson* held, "A judge who completes one term during which he was entitled to unlimited cost-of-living increases and elects to enter a new term has impliedly agreed to be bound by salary benefits then offered by the state for the different term." (27 Cal.3d at p. 540.) Similarly, it is argued, incumbent legislators commencing new terms on or after November 6, 1990, have impliedly agreed to serve under the conditions mandated by the new measure.

Petitioners and respondent PERS contend, however, that pension rights fall into a different category than salary rights. Although a state officer may have no protectible right to continuation of his former salary from term to term, nonetheless *on commencing to serve the state* the officer thereupon acquires a vested right to earn, through continued service, additional pension benefits in an amount reasonably comparable to those available when he or she first took office. According to petitioners, that right is not extinguished when one term of office ends and another commences. (See *In re Marriage of Alarcon* (1983) 149 Cal.App.3d 544, 552-553 [196 Cal.Rptr. 887] [hereafter *Alarcon*].) To hold otherwise, petitioners argue,

could unduly penalize public officers who serve elective or appointive terms.

We agree with petitioners. It would be anomalous to hold that a legislator's supposedly "vested" right to acquire a reasonable pension is subject to absolute divesting at the conclusion of the period comprising his or her immediate term of office (assuming no right to receive actual benefits has yet accrued). Under such a holding, a legislator could entirely lose future pension benefits on the very eve of entitlement thereto.

The state, in adopting the LRS, elected to treat legislators in a manner similar to other state employees, providing them with a plan whereby pension benefits could be acquired through continued service beyond their initial term of office. Having done so, the state cannot thereafter abandon that plan as to incumbent legislators without providing them comparable new benefits.

As stated in *Alarcon*, "The state's obligation to pay a specific salary extends to the end of each term of office. There is no promise express or implied the state will continue to pay an existing salary beyond the end of a term. Thus, no contractual rights are impaired if different salary or cost of living differentials are payable during and for a future term. [¶] A pension, however, is different from a salary. A right to pension benefits provided by the state payable upon fulfillment of age, service and other requirements may not be destroyed, once vested, without impairment of the state's contractual obligation. [Citations.]" (149 Cal.App.3d at p. 552.)

Alarcon is factually distinguishable, for in that case the affected officer (a state judge who later accepted a federal judgeship) had already acquired a vested, though

deferred, right under state law to a full pension *prior* to the enactment of the challenged restriction on pension benefits for persons accepting federal positions. Under such circumstances, the fact the judge served additional terms as a state judge following the adoption of that restriction could not defeat his previously vested pension rights.

Nonetheless, the principle of *Alarcon* seems controlling here. In the present case, incumbent legislators acquired a vested right to earn increased pension benefits in return for continued service. By analogy to *Alarcon*, their commencement of a new term following adoption of the pension restriction of Proposition 140 would not defeat that vested right.

Alarcon further observed that although vested pension rights could be modified before retirement "to keep a pension system flexible and permit adjustments to accord with changing conditions, such modifications must be reasonable and may not destroy or impair a vested contractual right to a pension. [Citations.]" (149 Cal.App.3d at p. 553.) As we have previously discussed, the pension provisions of Proposition 140, which abruptly terminate an incumbent legislator's right to earn future pension benefits through continued service, must be deemed an impairment, not a mere "modification" or "adjustment," of the vested pension rights of incumbent legislators, whether or not they will enter a new term on or after November 6, 1990.

Thus, we hold that, under California law, all incumbent legislators acquired a vested right to earn additional pension benefits through continued service, a right which Proposition 140 clearly impairs.

After granting review in this case, we asked for further briefing on the additional question whether the contract clause of the federal Constitution protects the salary or pension rights of state public officials such as legislators. (See, e.g., *Higginbotham v. Baton Rouge* (1939) 306 U.S. 535, 538-539 [83 L.Ed. 968, 971-972, 59 S.Ct. 705] rehg. den. 307 U.S. 649 [83 L.Ed. 968, 59 S.Ct. 705] [hereafter *Higginbotham*]; *Dodge v. Board of Education* (1937) 302 U.S. 74, 78-79; *Crenshaw v. United States* (1890) 134 U.S. 99, 105-106 [33 L.Ed. 825, 827-828, 10 S.Ct. 431]; *Butler v. Pennsylvania* (1850) 51 U.S. (10 How.) 402, 416-418 [13 L.Ed. 472, 478-479].)

In *Higginbotham, supra,* a public officer (commissioner of public parks) was discharged in the middle of his term and sued to recover the balance of his salary for the stated term, asserting a federal contracts clause claim. The high court, in a brief, unanimous opinion (citing earlier cases), denied relief, holding that the contract clause does not protect the tenure assigned to a state's public officers. The court relied on the "familiar principle that 'the legislative power of a State, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service.' [Citations.]" (306 U.S. at p. 538 [83 L.Ed. at p. 971].)

The *Higginbotham (supra,* 306 U.S. 535) principle, though stated in terms of "tenure," extends to matters of compensation of public officers. As stated in *Dodge v. Board of Education, supra,* 302 U.S. at pages 78-79 [83 L.Ed. at page 62], cited with approval in *Higginbotham,* state

legislation fixing the compensation of public officers "creates no contract in their favor and the compensation named may be altered at the will of the legislature." (See also *Crenshaw v. United States, supra,* 134 U.S. at p. 105 [33 L.Ed. at p. 828] [compensation paid to state public officers is not protected by federal contract clause].)

The applicable principle to be gleaned from *Higginbotham, supra,* 306 U.S. 535, appears to be that a state (or its local subdivisions) has the power at any time to create, alter or abolish state or local public offices, and thereby reduce the affected officers' salaries or other compensation, unfettered by federal contract clause restrictions. Respondent Eu and intervener argue that if, under *Higginbotham,* a state can terminate a public officer in the midst of his or her term without providing compensation for the remainder thereof, then it would follow that the state likewise can terminate future contributions toward his or her pension, assuming *state* statutory and constitutional guaranties are satisfied. But as petitioners observe, none of these high court cases involved the special area of vested pension rights, or concerned the rights of persons remaining in office for additional terms.

Although the issue is not entirely free of doubt, we conclude that the foregoing federal cases would not withhold federal contract clause protection from incumbent state legislators who have acquired vested pension rights under state law.

Higginbotham involved the *tenure* of public officials and the consequences arising from prematurely terminating that tenure. The case did not concern the quite distinct matter of the pension rights of public officials or

employees. As we explained in *Miller*, although the Legislature may reduce the tenure of a public employee's position, and thereby shorten his state service, public employee pension rights involve constitutionally protected obligations. "Pension rights, unlike tenure of civil service employment, are deferred compensation earned immediately upon the performance of services for a public employer '[and] cannot be destroyed . . . without impairing a contractual obligation. . . . ' [Citation.]" 18 Cal.3d at p. 814.)

Decisions of this court have assumed the federal contract clause protects the vested pension rights of public officers. *Olson* and *Betts*, both *supra*, involved public officers (a state court judge and a state constitutional officer, respectively), and those cases concluded, without discussion of the *Higginbotham/Dodge* line of decisions, that the federal contract clause would apply to such persons. (See also *Allen v. Board of Administration*, *supra*, 34 Cal.3d at p. 119.)

In *Lyon v. Flournoy* (1979) 271 Cal.App.2d 774 [76 Cal.Rptr. 869], appeal dismissed 396 U.S. 274 [24 L.Ed.2d 465, 90 S.Ct. 564], a case likewise involving the rights of a state public official, the Court of Appeal acknowledged the federal rule limiting federal contract clause protection for discharged state public officers (citing *Dodge v. Board of Education*, *supra*, 302 U.S. 74), and further observed that the public employee pension decisions of this court (e.g., *Kern v. City of Long Beach*, *supra*, 29 Cal.2d 848) "plac[ed] earned retirement rights within the shelter of the prohibition against contract impairment, without specific citation of either the federal or state clauses." (271 Cal.App.2d at p. 781.) The *Lyon* court

nonetheless concluded, "Certainly the California pension decisions have never rejected the federal clause as a source of protection. *It is now too late to do so. California law places earned pension rights of public officers and employees under the protection of the contract clause regardless of any characterization adopted by the federal courts.*" (*Ibid.*, italics added.)

We agree with *Lyon v. Flournoy, supra,* 271 Cal.App.2d 774, that, in light of prior California decisions consistently extending federal contract clause protection to state public officers, it is simply "too late" to retreat from the clear implication of those holdings. We conclude that the pension restrictions of Proposition 140 are unconstitutional under the federal contract clause as applied to incumbent legislators because they infringe on the vested pension rights of those persons.

2. *Nonincumbent Legislators*

As for nonincumbent legislators first assuming office after Proposition 140 became effective, it seems clear they acquired no vested or protectible right to a continuation of the pension system in operation prior to their employment and, accordingly, the measure properly may be applied to them. (See *Allen v. Board of Administration, supra,* 34 Cal.3d at p. 124.) Petitioners offer no argument or authorities suggesting a contrary rule as to such persons.

3. *Severability*

Although a portion of Proposition 140 is invalid as applied to incumbent legislators, its invalidity does not

affect the remaining provisions of the measure, for those provisions can be given effect without regard to the validity or operation of the invalid pension restrictions.

Although the drafters of Proposition 140 included a severance clause (section 11 of the measure), by its terms it pertains only to the subject matter of article VII, section 11, of the state Constitution (regarding the obligations of the LRS) rather than to the entire initiative measure. It is possible the framers intended to apply the severance clause to the entire measure, as the clause referred to "this measure" and was placed at the conclusion of the substantive provisions of Proposition 140. But in any event, it is clear that severance of particular provisions is permissible despite the absence of a formal severance clause. (See, e.g., *People v. Mirmirani* (1981) 30 Cal.3d 375, 387, fn. 9 [178 Cal.Rptr. 792, 636 P.2d 1130].)

As we stated in *Raven v. Deukmejian, supra,* 52 Cal.3d at pages 355-356, quoting from an earlier case, " '[t]he cases prescribe three criteria for severability: the invalid provision must be grammatically, functionally, and volitionally separable. [Citations.]' " In *Raven,* we invalidated a portion of Proposition 115 (an initiative pertaining to the rights of criminal defendants), but preserved the remainder, relying on the foregoing criteria for severability. The present measure likewise satisfies each of those criteria.

First, the invalid pension restriction, contained in new section 4.5 of article IV of the state Constitution, can be *grammatically* severed without affecting the operation

of the remaining clauses. In order to preserve the section's application to nonincumbent legislators, such severance would involve (1) striking from that section the words "or serving in," so that the section applies only to "a person elected to ~~or serving in~~ the Legislature on or after November 1, 1990," and (2) construing the resulting language as applicable only to nonincumbent legislators *first* elected to the Legislature on or after that date. (See *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 266-267 [284 Cal.Rptr. 718, 814 P.2d 704].)

Second, the invalid restriction is *functionally* severable, as its removal would not effect the function or operation of the remaining provisions. The term and budgetary limitations, together with the restriction on nonincumbent legislators' pension rights, can operate entirely independently of the invalid restriction.

Finally, the invalid portion of the measure is *volitionally* severable, in that the framers and voters undoubtedly would have adopted the remaining provisions had they foreseen the success of petitioners' challenge. The framers included language preserving any "vested"rights which may have accrued, disclosing an intent to accommodate any interests protected by federal contract clause principles. As for the voters, there is no indication they placed undue emphasis on the pension rights provision as it applied to incumbent legislators.

III. CONCLUSION

We conclude that, except for the restriction on pensions of incumbent legislators, Proposition 140 is constitutionally valid. The petition for a peremptory writ of mandate is granted to the extent it seeks to compel respondents to refrain from enforcing section 4 of Proposition 140 as applied to incumbent legislators. In all other respects, the petition for mandate is denied. The temporary stay issued on June 14, 1991, is vacated. The parties should bear their own costs. (See *Raven v. Deukmejian*, *supra*, 52 Cal.3d at p. 356.)

PANELLI, J., KENNARD, J., ARABIAN, J., BAXTER, J., and GEORGE, J., Concurred.

MOSK, J., Concurring and Dissenting.—I concur in the judgment insofar as it invalidates Proposition 140's purported restrictions on the retirement benefits of incumbent legislators.

Otherwise, I dissent.

In this case, we are presented with a broad challenge to Proposition 140—the promotionally self-styled "Political Reform Act of 1990"—under both the United States and California Constitutions. As will appear, the attack is successful on at least two separate and independent points: the initiative violates the single-subject rule of the state charter and also amounts to an unconstitutional revision of that instrument.

I. *Proposition 140 and the Single-subject Rule*

Beyond any doubt, Proposition 140 violates the single-subject rule on its face and, as a result, is invalid: "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect." (Cal. Const., art. II, § 8, subd. (d).)

At the outset, I must observe that "The initiative process is out of control in California. Voters are often unable to comprehend all that an initiative measure proposes to accomplish, and they are often asked to vote on a multitude of issues by casting a single ballot." (Note, *Putting the "Single" Back in the Single-Subject Rule: A Proposal for Initiative Reform in California* (1991) 24 U.C. Davis L.Rev. 879, 929 (hereafter Note).) Much, of course, is at stake. The inference is compelled by a consideration of the staggering costs of initiative campaigns. For example, in 1988 proponents and opponents spent more than $130 million in attempting to persuade the voters of the merits of their respective positions. (*Id.* at p. 889, fn. 55.)

Regrettably, I must also observe that in large part, the blame for this chaos must be laid to the court. "One way" to prevent such a situation "is by limiting measures to a single subject." (Note, *supra*, 24 U.C. Davis L.Rev. at pp. 929-930.) Such a means is available: the single-subject rule—which was designed to simplify and clarify initiatives (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 2, 1948), pt. I, argument in favor of Prop. 10, p. 8)—"is already part of the California Constitution . . . . " (Note, *supra*, 24 U.C. Davis L.Rev. at pp. 929-930.) But it is now notorious--and irresponsible--that "the California

Supreme Court is reluctant to enforce it. *In over forty years, the court has never invalidated an initiative measure for violating the single-subject rule.*" (*Id.* at p. 896, italics added.) It is also notorious--and irresponsible--that the court not only "avoid[s] invalidating initiatives under the single-subject rule," but also "avoid[s] altogether a meaningful application of the rule." (*Id.* at p. 899.)

I return to Proposition 140. In my concurring and dissenting opinion in *Raven v. Deukmejian* (1990) 52 Cal.3d 336 [276 Cal.Rptr. 326, 801 P.2d 1077], I discussed the single-subject rule at length with regard to Proposition 115 and its 31 sections. (52 Cal.3d at pp. 357-364 [conc. & dis. opn. of Mosk, J.].) The substance of that discussion was this: " . . . [T]he single-subject rule requires an initiative measure to constitute a coherent enactment in and of itself. It is not enough for such a measure to be capable of bearing some label of indefinite scope. It follows that the 'reasonably germane' test [which is used to apply the rule] must contain as its ultimate criterion whether an initiative measure is internally interrelated as a whole and parts. A standard that focuses on whether the measure is capable of bearing some label is simply empty." (*Id.* at p. 364 [conc. & dis. opn. of Mosk, J.].)

Examined under the foregoing principles, Proposition 140 does not satisfy the single-subject rule. The rule requires a coherent enactment. The test is whether the initiative is internally interrelated. The measure here fails.

By its very terms, Proposition 140 reveals itself to be incoherent: it lacks the requisite internal interrelationship. The initiative embraces three separate and

independent subjects—subjects that are unquestionably of major significance. The first concerns term limits for 132 elected state officials, excluding--for no discernible reason—only the Insurance Commissioner. The second deals with restrictions on the retirement benefits of legislators only. The third relates to limits on expenditures by the Legislature and no other branch of government.

The Legislative Analyst so understood Proposition 140. Indeed, in the analysis presented to the voters in the Ballot Pamphlet, he expressly declared that "This initiative makes three major changes to the California Constitution." (Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 6, 1990), analysis of Prop.140 by Legis. Analyst, p. 69 (hereafter Ballot Pamphlet).)

Proposition 140 must be read to have, as a broad purpose, the transformation of the California Constitution from an instrument that allows—and in the view of the initiative's proponents, actually invites—the election and reelection to the Legislature of "politicians," to one that prohibits such a result and in fact encourages service by "citizens."

Such a reading is compelled by the clear meaning of Proposition 140's plain words. Its provisions seek to bar any professional cadre from entering into, or arising out of, the Legislature.

This reading is confirmed by all the Ballot Pamphlet arguments relating to the initiative. Of course, proponents and opponents expressed conflicting opinions as to the wisdom of such a transformation. But both recognized its reality.

The majority find no single-subject violation. They reason that the initiative deals with a "unifying theme or common purpose" that they call "incumbency reform." (Maj. opn., *ante*, at p. 512. Such a theme is not "unifying"; such a purpose is not "common." The term "incumbency reform" is nothing more, and nothing less, than a seductive label of indefinite scope—a label that can be applied to any "grab bag" containing any provisions, no matter how numerous or heterogeneous, that relate to some officeholder in some way. It begs reality to hold that an initiative that "makes three major changes to the California Constitution" (Ballot Pamp., *supra*, analysis of Prop. 140 by Legis. Analyst, p. 69) embraces only one subject. But the majority cavalierly do so.[1]

II. *Proposition 140 and the Revision Requirements*

Proposition 140 amounts to an unconstitutional revision of the state charter on its face and, as a result, is invalid.

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[1] I recognize that the majority opinions in *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 245-253 [186 Cal.Rptr. 30, 651 P.2d 274], and *Raven v. Deukmejian*, *supra*, 52 Cal.3d 336, 346-349, furnish some support for the conclusion of the majority here. But the reasoning of *Brosnahan* in this regard is demonstrably faulty. (*Brosnahan v. Brown*, *supra*, at p. 299 [dis. opn. of Mosk, J.]; *Raven v. Deukmejian*, *supra*, at pp. 363-364 [conc. & dis. opn. of Mosk, J.].) So too is that of *Raven*. (*Raven v. Deukmejian*, *supra*, at pp. 364-365 [conc. & dis. opn. of Mosk, J.].) It is never too late, or too early, to correct error. My colleagues, however, fail to take the opportunity presented by this case to overrule *Brosnahan* and *Raven* to the extent that they are implicated here. No justification or excuse appears.

Article XVIII of the California Constitution, which is entitled "Amending and Revising the Constitution," provides for (1) amendment by proposal of the Legislature *or* initiative by the people and (2) revision by proposal of the Legislature *or* constitutional convention called by the Legislature with the approval of the people. Manifestly, these procedures are exclusive. Thus, an amendment may be effected *only* by legislative proposal or popular initiative. And a revision may be effected *only* by legislative proposal or constitutional convention. It follows that a popular initiative may amend *but may not revise*. (*Brosnahan v. Brown, supra,* 32 Cal.3d at p. 260; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 221 [149 Cal.Rptr. 239, 583 P.2d 1281].)

"Amendment" and "revision" are not defined in article XVIII or elsewhere in the California Constitution in express terms. But almost 100 years ago, in *Livermore v. Waite* (1894) 102 Cal. 113 [36 P. 424], the court suggested their meaning.

At that time, article XVIII provided "two methods" for effecting changes in the Constitution: revision by constitutional convention and amendment by legislative proposal. (*Livermore v. Waite, supra,* 102 Cal. at p. 117.)

The *Livermore* court declared: "Under the first of these methods the entire sovereignty of the people is represented in the convention. The character and extent of a constitution that may be framed by that body is freed from any limitations other than those contained in the constitution of the United States . . . . The constitution itself has been framed by delegates chosen by the people

for that express purpose, and has been afterwards ratified by a vote of the people, . . . and the provision in article XVIII that it can be revised only in the same manner, and after the people have had an opportunity to express their will in reference thereto, precludes the idea that it was the intention of the people, by the provision for amendments authorized in the . . . article, to afford the means of effecting the same result which . . . has been guarded with so much care and precision. The very term 'constitution' implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." (*Livermore v. Waite, supra,* 102 Cal. at pp. 117-119.)

More than 50 years later, in *McFadden v. Jordan* (1948) 32 Cal.2d 330 [196 P.2d 787], the court considered whether the so-called "California Bill of Rights," if approved, would effect an amendment or a revision.

At the threshold, the *McFadden* court set out the principles stated in *Livermore.* It then proceeded to determine their applicability to initiatives. "The initiative power reserved by the people by amendment to the Constitution in 1911 [citation] applies only to the proposing and the adopting or rejecting of 'laws and amendments to the Constitution' and does not purport to extend to a constitutional revision." (*McFadden v. Jordan, supra,*

32 Cal.2d at p. 333.) It went on to explain: "The differentiation" "between *amend* and *revise*" "is not merely between two words; more accurately it is between two procedures and between their respective fields of application. . . . The people of this state have spoken; they made it clear when they adopted article XVIII and made amendment relatively simple but provided the formidable bulwark of a constitutional convention as a protection against improvident or hasty (or any other) revision, that they understood that there was a real difference between amendment and revision." (*Id.* at p. 347.)

Among other things, observed the *McFadden* court, the "California Bill of Rights" would (1) add what were in actuality 12 articles in 208 sections with over 21,000 words to a document containing 25 articles in 347 sections with about 55,000 words; (2) repeal or substantially alter at least 15 of those 25 articles; (3) treat a minimum of 4 new topics; and (4) substantially curtail the functions of both the legislative and executive branches. (*McFadden v. Jordan, supra,* 32 Cal.2d at pp. 334-345.)

"Applying the long established law to any tenable view of the facts which have been related," the *McFadden* court concluded, "it is overwhelmingly certain that the measure now before us would constitute a revision of the Constitution rather than an amendment or 'such an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purposes for which it was framed.' " (*McFadden v. Jordan, supra,* 32 Cal.2d at pp. 349-350, quoting *Livermore v. Waite, supra,* 102 Cal. at pp. 118-119.)

Next, in *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, supra,* 22 Cal.3d 208, the court addressed the question whether Proposition 13, which added article XIII A to the California Constitution, was amendatory or revisory. It stated: "Taken together our *Livermore* and *McFadden* decisions mandate that our analysis in determining whether a particular constitutional enactment is a revision or an amendment must be both quantitative and qualitative in nature. For example, an enactment which is so extensive in its provisions as to change directly the 'substantial entirety' of the Constitution by the deletion or alteration of numerous existing provisions may well constitute a revision thereof. However, even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also." (22 Cal.3d at p. 223.) Applying the foregoing standard, the court determined that Proposition 13 had insufficient qualitative or quantitative effect to constitute a revision.

Then, in *People v. Frierson* (1979) 25 Cal.3d 142 [158 Cal.Rptr. 281, 599 P.2d 587], a plurality of the court considered in dictum whether a 1972 initiative measure was amendatory or revisory. The measure added section 27 to article I of the California Constitution, validating the death penalty as a permissible punishment under that instrument. The plurality concluded that the initiative effected an amendment only: "In *Amador Valley*, we observed that 'even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision. . . .' (P. 223.) Section 27, however, accomplishes no such

sweeping result." (25 Cal.3d at pp. 186-187 (plur. opn.), citation omitted [dictum].)

Next, in *Brosnahan v. Brown, supra,* 32 Cal.3d 236, the court addressed whether Proposition 8, as a whole, was amendatory or revisory. Applying the "dual analysis" of *Amador Valley,* which "examin[es] both the quantitative and qualitative effects of" an initiative "upon our constitutional scheme," the court concluded that the measure "did not accomplish a 'revision'. . . . " (32 Cal.3d at pp. 260-261.)

Finally, in *In re Lance W.* (1985) 37 Cal.3d 873 [210 Cal.Rptr. 631, 694 P.2d 744], the court considered whether section 3 of Proposition 8, which added article I, section 28, subdivision (d), to the California Constitution, was revisory. It had first determined that section 3 of the initiative abrogated the judicially created exclusionary rule as a remedy for the violation of a criminal defendant's state constitutional right against unreasonable searches and seizures. It reasoned that the people's exercise of the legislative power to restrict judicial authority in this area "does not, either qualitatively or quantitatively, 'accomplish such far reaching changes in the nature of [judicial authority] as to amount to a revision' of the Constitution" because such power is constitutionally recognized and its use in this matter does not amount to "a sweeping change either in the distribution of powers made in the organic document or in the powers which it vests in the judicial branch. . . . " (37 Cal.3d at pp. 891-892.)

In light of the case law, the definitional standard applicable for purposes of article XVIII of the California

Constitution is as follows. A "revision" denotes a change that is qualitatively or quantitatively extensive, affecting the "underlying principles upon which [the Constitution] rests" or the "substantial entirety of the instrument." (*Livermore v. Waite, supra,* 102 Cal. at p. 118.) By contrast, an "amendment" denotes a change that is qualitatively and quantitatively limited, making a modification "within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." (*Id.* at pp. 118-119.)[2]

I now turn to the question whether Proposition 140 amounts to an unconstitutional revision.

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[2] It could perhaps be argued that the definitional standard may require modification. In *Livermore,* the court reasoned in substance that "revision" denoted qualitatively or quantitatively extensive change because the process of revision as then defined, i.e., by constitutional convention, was exceptionally difficult. In *McFadden,* the court adhered to that reasoning because its predicate still obtained. In *Amador Valley,* the court recognized that a change had been wrought: formerly, "a constitutional revision could be accomplished *only* by the elaborate procedure of the convening of, and action by, a constitutional convention" (22 Cal.3d at p. 222, italics in original); now, it can also be effected by the relatively simple procedure of legislative proposal (*id.* at p. 221). The court implied the change was "significant." (*Id.* at p. 222.) But it apparently failed to appreciate precisely what its "significance" was. Because the process of revision as now defined is slightly, if at all, more difficult than the process of amendment, "revision" might perhaps be deemed to denote a change that is slightly, if at all, more extensive than that accomplished by "amendment." In a word, if an "amendment" is a modification "within the lines of the original instrument," a "revision" is any change beyond those lines in any degree.

As explained above, the initiative has as a broad purpose the transformation of the California Constitution from an instrument that allows, and perhaps actually invites, the election and reelection to the Legislature of "politicians," to one that prohibits such a result and in fact encourages service by "citizens."

I observe at the outset that the wisdom of Proposition 140 is of no consequence to the analysis. To be sure, the initiative may be judged foolish and impractical. But it may also be viewed otherwise. Certainly, the exercise of governmental authority by "citizens" as opposed to "politicians," including the wielding of legislative power, has long been an ideal within the Western political tradition, and sometimes even a reality. (See Maio, *Politeia and Adjudication in Fourth-Century B.C. Athens* (1983) 28 Am. J. Juris. 16, 17-23.) Again, however, the desirability of the measure is immaterial.

The basic governmental plan of California is established, of course, by the California Constitution. The powers are the legislative, executive, and judicial. (Cal. Const., art. III, § 3.) The branches that are vested with those powers are, respectively, the Legislature (*id.*, art. IV, § 1), the Governor (*id.*, art. V, § 1), and the judiciary (*id.*, art. VI, § 1).

The nature of the three powers and the function of the three branches have been settled since virtually the inception of our polity.

In *Nougues v. Douglass* (1857) 7 Cal. 65, the court stated: "The three great departments are essentially different in their constitution, nature, and powers, and in the means provided for each by the Constitution, to

enable each to perform its appropriate functions. These three departments are all equally necessary to the very existence of the government. [¶] The legislative power is the creative element in the government, and was exercised partly by the people in the formation of the Constitution. It is primarily [*sic*] and original, antecedent and fundamental, and must be exercised before the other departments can have anything to do. Its exercise is a condition *precedent*, and the exercise of the executive and judicial functions are conditions *subsequent*. The legislative power makes the laws, and then, after they are so made, the judiciary expounds and the executive executes them." (*Id.* at pp. 69-70, italics in original.)

Manifestly, Proposition 140 amounts to an unconstitutional revision because of its significant effect on the Legislature.

As the discussion above reveals, the Legislature is a fundamental component of the state constitutional system. It is one of the "three great departments" and is "necessary to the very existence of the government." (*Nougues v. Douglass, supra*, 7 Cal. at pp. 69-70.) Indeed, its power is the "creative element" in the scheme. (*Id.* at p. 70.)

Moreover, the Legislature must be deemed fundamentally altered by any substantial change in its nature or character.

Finally, the change that would be effected by Proposition 140 would be substantial. In the state's history, only two such changes have clearly been of this sort: The movement from a full-time Legislature with broad powers to a part-time body subject to narrow limitations,

which was effected when the present Constitution superseded the original instrument in 1879; and a movement in the opposite direction, which was accomplished under the successful proposal of the California Constitutional Revision Commission in 1966. The change here would be of similar magnitude: "citizens" would be put in the Legislature in the place of "politicians."

In *Raven v. Deukmejian, supra,* 52 Cal.3d 336, we held that section 3 of Proposition 115 amounted to an unconstitutional revision because of its significant effect on the judiciary. The provision in question, designed to amend article I, section 24, of the California Constitution, would have restricted the power of state courts to interpret certain state constitutional rights of criminal defendants. Like the Legislature, the judiciary is one of the "three great departments" and is "necessary to the very existence of the government." (*Nougues v. Douglass, supra,* 7 Cal. at pp. 69-70.) Also like the Legislature, it must be deemed fundamentally altered by any substantial change in its nature or character. The change threatened by section 3 of Proposition 115 would have been such.

It follows a fortiori that an initiative that would put laypersons into the judiciary in the place of jurists would amount to an unconstitutional revision because of its significant effect on that branch. Clearly, such a provision would go far beyond section 3 of Proposition 115 in fundamentally altering the courts by effecting a substantial change in their nature and character.

If an initiative like the foregoing would be an unconstitutional revision, so too Proposition 140. The one

would improperly affect the judiciary, the other the Legislature.

In sum, Proposition 140 would fundamentally alter a fundamental component of the state constitutional system by effecting a substantial change in the nature and character of the Legislature. Such an alteration, of course, would be qualitatively extensive, affecting the "underlying principles upon which [the Constitution] rests." (*Livermore v. Waite, supra,* 102 Cal. at p. 118.) Therefore, it would be revisory.

The majority conclude to the contrary. They reason that Proposition 140's possible future consequences for the Legislature are not dispositive. I agree. They also reason that the initiative does not affect the Legislature's constitutional structure or powers. Again, I agree. But as explained above, a judiciary comprising laypersons is fundamentally different from one made up of jurists—even if its structure and powers are the same. Similarly, a Legislature of "citizens" is fundamentally different from one of "politicians." It is a "citizen" Legislature that is the measure's object and also its necessary and inevitable effect.

The majority's claim that "the initiative process may represent the only *practical* means of achieving the kind or 'reforms' of the Legislature involved here" (maj. opn., *ante,* at p. 506, italics added) is simply immaterial. The initiative process is not a *proper* means of achieving "reforms" that are revisory. True, "our Constitution plac[es] '[a]ll political power' in the people" and recognizes their " . . . right to alter or reform [government] when the public good may require.' " (*Id.* at p. 511, italics

deleted.) But it also restricts the wielding of that power and the exercise of that right through various provisions —among which, or course, are the requirements governing revision.

III. *Conclusion*

For all the reasons stated above, I would invalidate Proposition 140 in its entirety as violative of the single-subject rule and as unconstitutionally revisory.[3]

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[3] Because of the result I reach, I need not proceed further. I note in passing that Proposition 140 is also arguably invalid as a bill of attainder proscribed by article I, section 10, clause 1, of the United States Constitution. Bills of attainder, within the meaning of the federal charter, are "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. . . ." (*United States v. Lovett* (1946) 328 U.S. 303, 315 [90 L.Ed. 1252, 1259, 66 S.Ct. 1073].) In substance and effect, the measure here is such: it is a popular initiative that imposes the nonjudicial penalty of disqualification on the "easily ascertainable members" of the Legislature who were its primary targets. With apparent reason, the punishment of disqualification is visited on those who are convicted of certain crimes specified in the Constitution and statutes of California. (See Gov. Code, § 1021.) With no reason whatever, the same penalty now awaits those who were Proposition 140's primary targets. With less reason still, it also awaits all others who hold or will hold offices specified in the initiative.

APPENDIX B

Selected relevant California Government Code statutes providing for the Legislators' Retirement System are as follows:

§ 9350.1

Unless the context otherwise requires, the definitions and general provisions set forth in this article govern the construction of this chapter.

§ 9350.2

"Retirement system" or "this system" means the Legislators' Retirement System established by this chapter.

§ 9350.3

"Board of Administration" or "Board" means the Board of Administration of the Public Employees' Retirement System.

§ 9350.4

"Retirement Fund" or "fund" means the Legislators' Retirement Fund established by this chapter.

§ 9350.5

"Member" means any person who is a member of this system.

§ 9350.55

"Legislative statutory officer" means any of the following officers who has 10 or more years' full-time state service: (a) the Secretary of the Senate, (b) the Chief Clerk of the Assembly, (c) the Sergeant at Arms of the Senate, and (d) the Sergeant at Arms of the Assembly.

§ 9350.56

"State service," within the meaning of Sections 9350.55 and 9356.15, means employment with the Legislature or either house thereof as an officer or employee.

§ 9350.6

"Compensation" and "salary" mean the remuneration paid in cash out of funds controlled by the state, excluding mileage, reimbursement for expenses incurred in the performance of official duties, and any per diem allowance paid in lieu of such expenses.

§ 9350.7

"Regular interest" means interest at the annual rate fixed by the board, compounded annually, plus such additional interest as the board may credit from year to year.

§ 9350.8

"Contributions" means contributions made by a member at the rate of contribution prescribed in this chapter and not contributions made by the state unless the context otherwise requires a different construction.

§ 9350.9

"Accumulated contributions" means the sum of all contributions standing to the credit of a member's account, and interest thereon.

§ 9350.10

"Net earnings" means the earnings of the retirement fund less the administrative costs specified in Section 9354 and transfers to the reserve against deficiencies.

§ 9351

"Service" means the period of time, computed in years and fractions thereof, a member has held office as a Member of the Senate or of the Assembly or as an elective officer of the state in any office provided for by the Constitution, except that of judge. "Service," with respect to a legislative statutory officer, shall be construed to refer to "state service," as defined in Section 9350.56.

In computing years of service under this act, each full term served as a Member of the Senate shall be deemed to constitute four (4) calendar years, each full term served as a Member of the Assembly shall be deemed to constitute two (2) calendar years, and each period of service from the commencement of one general session of the Legislature to the commencement of the next, prior to the term commencing in 1967, shall be deemed to constitute two (2) calendar years. Commencing in 1967, each period of service from the commencement of one regular session of the Legislature to the commencement of the next shall be deemed to constitute one (1) calendar year. Commencing in 1973, each period of service from the commencement of one regular session of the Legislature to the commencement of the next shall be deemed to constitute two (2) calendar years. Each full term served as an elective officer of the state whose office is provided for by the Constitution shall be deemed to constitute four (4) calendar years.

§ 9351.1

"Retirement" means withdrawal from membership in this system with a retirement allowance granted under this chapter.

§ 9351.2

"Benefit" means the retirement or survivor allowance granted under this chapter or payment of accumulated contributions or lump-sum payments with respect to the death of a member.

§ 9351.3

"Legislator" means a Member of the Assembly or a Member of the Senate, an elective officer of the state whose office is provided by the Constitution, or a legislative statutory officer.

§ 9353

This system shall be administered by the Board of Administration of the Public Employees' Retirement System. The board shall administer this system in accordance with the provisions of the Public Employees' Retirement Law to the same extent and with the same effect as if those provisions are contained in the Legislator's Retirement Law, except for those provisions which provide for the payment of an allowance or other benefit and except for those provisions which conflict with any provision or provisions of the Legislators' Retirement Law.

§ 9353.1

The board may make such rules as it deems necessary and proper for the administration of this system.

§ 9353.2

The board shall determine who are members of this system and is the sole judge of the conditions under which persons may be admitted to and continue to receive benefits under this system.

§ 9353.5

Each member of this system shall file with the board such information affecting his status as a member as the board may require.

§ 9353.6

The Chief Clerk of the Assembly shall give the board immediate written notice of the change in status of any legislative statutory officer elected by the Assembly or Member of the Assembly resulting from induction into office, resignation, expulsion, death, or any other circumstances terminating his office as Member of the Assembly, or as such a legislative statutory officer, and the Secretary of the Senate shall give the board immediate written notice of any such change in status of any Member of the Senate or legislative statutory officer elected by the Senate. The Secretary of State shall give the board immediate written notice of any such change in status of any elective state officer who is eligible to membership in the system.

§ 9354

The Legislators' Retirement Fund in the State Treasury is hereby established. All moneys received by this system pursuant to this chapter shall be deposited in the fund, and all retirement allowances, benefits, optional settlements, and other obligations or payments payable by this system pursuant to this chapter shall be paid from the fund. Costs of administration shall be paid from annual appropriations from earnings on the fund.

§ 9354.4

The Secretary of State, at the time of issuing a certificate of election to the office of Member of the Senate or of the Assembly shall include a notice notifying the

member-elect of his right to elect membership in the Legislators' Retirement System.

§ 9354.5

The board shall keep in convenient form such data as is necessary for the actuarial valuation of this system. As of June 30, 1973 and thereafter at the ends of periods not to exceed four years, it shall cause to be made an actuarial investigation into the mortality, service and compensation experience of members and persons receiving benefits and an actuarial valuation of the assets and liabilities of this system. From time to time it shall determine the rate of interest being earned on the Legislators' Retirement Fund.

The board shall cause to be published, as of the date of the investigation and valuation, a financial statement showing an actuarial valuation of the assets and liabilities of this system and a statement as to the accumulated cash and securities in the Legislators' Retirement Fund as certified by the Controller.

The board shall include recommendations for financing the system in the financial statement.

§ 9355

Any member of the Senate or Assembly may file with the board at any time during incumbency in such office, a written election to become a member of this system. Upon the filing of the election he becomes a member of this system on the first day of the month following the filing of the election.

§ 9355.1

A person ceases to be a member of this system:

(a) Upon retirement pursuant to this chapter.

(b) Upon death.

(c) Except as provided in Section 9355.2 or while absent on military service, on the thirty-first day after he ceases to be a legislator.

(d) Upon resignation from membership in this system.

§ 9355.16

Any member of this system who is charged, by indictment, with the commission of any felony involving the accepting or giving, or offering to accept or give, any bribe, the embezzlement of public money, extortion, theft of public funds, perjury, or conspiracy to commit any of said crimes, arising directly out of his official duties, and who is a fugitive from justice, shall be suspended from membership in this system while such charge is pending and until final disposition of the charge. At any time during the period of suspension of membership, the person so suspended shall be entitled to withdraw his accumulated contributions from the system, and such withdrawal shall constitute an election to terminate membership in the system.

This section applies only to persons who are charged with the commission after the effective date of this section of a felony described in this section by an indictment filed after the effective date of this section.

§ 9355.3

Any member may resign from this system at any time prior to retirement, by written resignation filed with the Board of Administration.

§ 9355.4

Every elective officer of the State whose office is provided for by the Constitution, except judges, may become a member of this system. Every such officer in office at the time this section becomes effective may, within ninety days after the effective date, file with the board a written election to become a member of this system. Every such officer elected after the effective date of this section may file an election within ninety days after the commencement of the first term of office for which he is elected. Upon the filing of the election he becomes a member of this system on the first day of the month following the filing of the election.

§ 9355.45

Every legislative statutory officer may become a member of this system. Every such officer in office at the time this section becomes effective may, within 90 days after the effective date, file with the board a written election to become a member of this system. Every such officer, elected after the effective date of this section, may file an election within 90 days after the commencement of the first term of office for which he is elected after attaining status as a legislative statutory officer. Upon the filing of the election he becomes a member of this system on the first day of the month following the filing of the election.

§ 9356

Each member of this system shall receive credit for service for time during which he holds office as a legislator after becoming a member of this system.

A member may also receive credit for time during which he held office as a legislator prior to becoming a member, provided he makes contributions therefor to the Legislators' Retirement Fund, as provided in Section 9357.2.

§ 9356.1

Each member who rendered service prior to the date this chapter becomes operative shall receive credit therefor if he makes contributions therefor to the Legislators' Retirement Fund, as provided in Section 9357.2. No member shall receive credit for any service for which he has not contributed as required by this chapter.

§ 9357

For each year of service rendered after the date this chapter becomes operative each legislator who is a member of this system shall contribute 4 percent of his compensation as a legislator unless he is subject to other contribution provisions of this chapter. Such contributions shall be paid as provided in Section 9357.1.

§ 9357.01

Notwithstanding the provisions of Section 9357 or 9357.05, the rate of contribution for a member of the system first elected after the date this section becomes operative shall be 8 percent.

§ 9357.1

Immediately upon receipt of the written election of a legislator to become a member of this system, the board of administration shall certify to the State Controller the name of such member. The Controller shall deduct from each warrant drawn in payment of compensation to the member the amount of contribution at the rate prescribed by the provisions of this chapter with respect to his service as a member of this system, and shall remit such amount to the board of administration, to be deposited in the Legislators' Retirement Fund.

§ 9357.15

With respect to each person who is a member of the system pursuant to Section 9355.45, the Controller shall deduct 6½ percent from each warrant drawn in payment of compensation to such member, and 8 percent from each warrant drawn in payment of compensation to such members first elected after March 4, 1972, and shall remit such amount to the board of administration, to be deposited in the Legislators' Retirement Fund.

§ 9357.2

Any member who rendered service prior to the date he became a member may elect, at any time prior to retirement, to contribute to the Legislators' Retirement Fund for each year or fraction thereof for which he desires to receive credit for service, a percentage of the compensation received by him in respect to such service at the rate prescribed by the provisions of this chapter with respect to his service as a member of this system.

Such contributions may be paid by lump sum payment or by installment payments over a period not in

excess of the length of time for which the member has elected to receive credit for such prior service, at times and in a manner fixed by the board. No member shall receive credit for any service for which he has not contributed as required by this chapter.

§ 9357.3

If the membership of a member is terminated, except by death or retirement pursuant to this chapter, he shall be paid forthwith all of his accumulated contributions.

§ 9357.4

A member may redeposit in the Legislators' Retirement Fund, in one sum or in not to exceed 12 monthly or 24 semimonthly payments, an amount equal to any accumulated contributions that have been repaid to him pursuant to Section 9357.3, subject to minimum payments fixed by the board, and if he makes such redeposit, he shall receive credit for all service with which he was credited at the time of such repayment.

§ 9358

The state shall make contributions on account of liability for benefits under this chapter in a sum equal to 18.81 percent of the compensation paid members of this system.

From the General Fund in the State Treasury there is appropriated monthly to the Legislators' Retirement Fund the state's contribution pursuant to this section.

§ 9359

Upon his written application therefor to the Board of Administration, (a) any member of this system who was a member on the effective date of this amendment who has

attained age 60, (b) any member who hereafter becomes a member of this system who has attained age 60 and who is credited with four (4) or more years of service, or (c) any member, regardless of age, who is credited with twenty (20) or more years of service, shall be retired, and thereafter shall receive for life the retirement allowance provided in this chapter.

A written application for retirement may be filed at any time during the term of office of the member, or within thirty (30) days after the expiration of his term of office. Any application which does not specify a different date as the effective date of retirement applied for shall be deemed to be an application for retirement as of the day following the expiration of the term of office of the member.

§ 9359.1

(a) The retirement allowance for a member all of whose credited service was rendered as a Member of the Senate or Assembly except as provided in subdivision (d) is an annual amount equal to five percent (5%) of the compensation payable, at the time payments of the allowance fall due, to incumbent Members of the Senate or Assembly, multiplied by the number of years of service with which the member is credited at the time of his retirement, not to exceed fifteen (15) years. In no event shall any retirement allowance payable under this chapter to any such member exceed the compensation payable to Members of the Legislature at the time the payment of the allowance is made, except that the retirement allowance of any such member who is credited with more than 15 years shall be increased by an amount equal to 3 percent of the compensation payable, at the time

payment of the allowance falls due, to incumbent Members of the Senate or Assembly for each year or fraction of a year in excess of 15 years.

(b) The retirement allowance for a member all of whose credited service was rendered as an elective officer of the state whose office is provided for by the Constitution other than a judge (and other than a Member of the Senate or Assembly) the sum of (1) is an annual amount equal to five percent (5%) of the highest compensation received by the officer while serving in such office, multiplied by the number of years of service with which the member is credited at the time of his retirement, not to exceed eight (8) years, plus, if the member is credited with 24 or more years of service, (2) one and two-thirds percent (1⅔%) of the compensation to which the five percent (5%) rate is applicable under subparagraph (1) of this subdivision for his first eight years of credited service, multiplied by the number of years of service in excess of eight years with which the member is credited at the time of his retirement, not to exceed 12 years of such credited service in excess of the eight years of service referred to in subparagraph (1) of this subdivision.

(c) The retirement allowance for a member part of whose credited service was rendered as a Member of the Senate or Assembly and part of whose credited service was rendered as an elective officer of the state whose office is provided for by the Constitution, other than a judge (and other than a Member of the Senate or Assembly) is the sum of (1) an annual amount equal to five percent (5) of all the compensation, at the time payment of the allowance falls due, to the officer holding the highest salaried office which the member held at any time

during his service prior to retirement, multiplied by the number of years of service with which the member is credited at the time of his retirement, not to exceed eight (8) years, plus, if the member is credited with 24 or more years of service, (2) one and two-thirds percent (1⅔%) of the compensation to which the five percent (5%) rate is applicable under subparagraph (1) of this subdivision for his first eight years of credited service, multiplied by the number of years of service rendered as an elective officer of the state whose office is provided for by the Constitution, other than a judge and other than a Member of the Senate or Assembly, with which the member is credited at the time of his retirement, not to exceed 12 years of such credited service in excess of the eight years referred to in subparagraph (1) of this subdivision. If, however, the member would be entitled to receive a greater allowance under subdivision (a), (b), or (d) of this section if all of his credited service had been rendered as a Member of the Senate or Assembly or as an elective officer of the state whose office is provided for by the Constitution other than a judge (and other than a Member of the Senate or Assembly), then all of his credited service shall be deemed to have been rendered as a Member of the Senate or Assembly or as such other elective officer, and he shall receive a retirement allowance computed under subdivision (a), (b), or (d) of this section, whichever is greater.

(d) The retirement allowance for a member, all of whose service was rendered as a Member of the Senate or Assembly, who is the surviving spouse of a deceased Member of the Senate or Assembly and who becomes the immediate successor in office of such deceased Member of the Senate or Assembly is an annual amount equal to

five percent (5%) of the compensation payable, at the time the payments of the allowance fall due, to incumbent Members of the Senate or Assembly, multiplied by the number of years of service with which the member is credited at the time of retirement plus the number of years of service as a Member of the Senate or Assembly rendered by the member's deceased husband or wife plus any period in the term, for which the deceased member was elected, following his or her death, not to exceed fifteen (15) years. In no event shall any retirement allowance payable under this chapter to any such member exceed the compensation payable to Members of the Legislature at the time the payment of the allowance is made, except that the retirement allowance of any such member, whose total service creditable under this subdivision is in excess of fifteen (15) years, shall be increased by an amount equal to 3 percent of the compensation payable, at the time payment of the allowance falls due, to incumbent Members of the Senate or Assembly for each year or fraction of a year in excess of fifteen (15) years. This same computation of total service creditable shall be used as a basis in determining eligibility for retirement, under Sections 9359 and 9359.16, of a member described in this subdivision. Any member to whom this subdivision applies shall redeposit an amount equal to the contributions which were required to be contributed by his or her deceased spouse while he or she was a member of the system for his or her service, computed on the basis of the salary and rate of contribution in effect at the time such service was rendered, or would have been rendered, in the Legislators' Retirement Fund on account of the service of his or her deceased spouse in order to

use such service for the purpose of this section and Sections 9359 and 9359.16.

The amendments to this section enacted at the 1969 Regular Session shall apply with respect to any member who retired or retires, or died or dies while eligible to retire on or after May 1, 1969, and any allowance payable with respect to such a member who retired or died prior to the effective date of such amendment, shall be adjusted effective from the date of retirement or death to the amount it would have been had the amendment been in effect on that date.

The provisions of Sections 9359.11 and 9359.12 of this code shall control over any conflicting provisions of this section.

The amendments to this section during the 1973-74 Second Extraordinary Session shall not be applicable to members who are retired on the effective date of the amendments.

§ 9359.13

Notwithstanding any contrary provision of Section 9359.1 the retirement allowance of a member who is an elective officer of the state whose office is provided for by the Constitution, other than a judge or a Member of the Senate or Assembly, first elected to any such office after the effective date of this section and any allowance payable to a survivor of such member on death before or after retirement shall not be based on compensation in excess of the highest compensation received by the member as an incumbent of such office. Allowances payable to such members or survivors shall be adjusted under Section 9360.10 rather than 9360.9.

§ 9359.16

Notwithstanding the provisions of Section 9359, a member of this system, other than a legislative statutory officer, who is under age 60 and who is entitled to be credited with fifteen (15) or more, but less than twenty (20) years of service shall be retired upon his written application therefor to the Board of Administration, and thereafter shall receive for life the retirement allowance provided by this section. The allowance shall be equal to the retirement allowance which he would receive for such service upon retirement at age 60 reduced by two percent (2%) for each year by which the member's age at the time of retirement is below age 60.

§ 9359.2

A retirement allowance granted by this chapter is payable in equal monthly installments but a smaller pro rata amount may be paid for part of a month when the period of payment begins after the first or ends before the last day of the month.

§ 9359.3

The right of a person to any benefit or other right under this chapter and the money in the Legislators' Retirement Fund are not subject to execution, garnishment, attachment, or any other process whatsoever, and are unassignable except as specifically provided in this chapter.

§ 9359.4

A member may at any time designate a beneficiary to receive such benefits as may be payable to his beneficiary or estate under this chapter, by a writing filed with the

board. To be eligible to be so designated a person shall have an insurable interest in the life of the member.

§ 9359.5

The designation of a beneficiary under this system, other than designations under Optional Settlements 2, 3 and 4, may be revoked at the pleasure of the person who made it and a different beneficiary designated by a writing filed with the board.

§ 9359.6

The designation of a beneficiary by a member is not affected by termination of nor a break in his membership.

§ 9359.8

Upon the death of any member before retirement, the member's accumulated contributions shall be paid to the member's beneficiary, if he or she has designated one, and if not, to his or her estate. There shall also be paid to his or her beneficiary or estate an amount equal to one-twelfth of the annual compensation of the office last held by the member as a legislator during the 12 months immediately preceding his or her death or that would have been applicable under Section 9359.1, whichever is greater, multiplied by the number of completed years of service and prior service for which the member is entitled to elect to receive credit. The benefits provided by this section are in addition to any benefits provided by Division 4 (commencing with Section 3201) of the Labor Code.

The benefit accorded by this section is not payable if the deceased member's spouse survives him or her and is entitled to receive an allowance for life pursuant to this chapter.

§ 9360.9

Notwithstanding any other provisions of this chapter, the provisions of this section shall be applicable to all allowances granted by this chapter commencing with each installment paid or payable on or after January 1, 1964, with respect to Members of the Senate or the Assembly not having service in such office during or after the term commencing in 1967 and members who are elective officers of the state whose offices are provided by the Constitution and who were first elected to any such office prior to January 1, 1966.

On or before January 1, 1964, the board shall adjust the amount of the allowances payable during the 1964 calendar year to reflect any increase in cost of living occurring between the 1963 calendar year and the 1955 calendar year, inclusive, and any increase resulting from such adjustment shall be payable commencing with each installment of allowances paid or payable on or after January 1, 1964. On or before January 15, 1965, and, on or before January 15 of each year thereafter, the amount of the allowances provided by this chapter shall be adjusted by the board to reflect any increase in cost of living occurring after January 1 of the immediately preceding calendar year. Effective January 1, 1985, the United States city average of the "Consumer Price Index for all Urban Consumers," as published by the United States Bureau of Statistics, shall be used as the basis for determining the changes in the cost of living. For the period from January 1, 1978, through December 31, 1984, the average of the separate indices of the "Consumer Price Index for All Urban Consumers" for the Los Angeles-Long Beach-Anaheim area, and the San Francisco-Oakland area, as

published by the United States Bureau of Labor Statistics, shall be used as the basis for determining the changes in the cost of living. For the period prior to January 1, 1978, the average of the separate indices for the Los Angeles-Long Beach area and the San Francisco-Oakland area, as published by the United States Bureau of Labor Statistics, shall be used as the basis for determining the changes in the cost of living. The cost-of-living increase shall equal or exceed 1 percent before any adjustment is made in the allowance. The calendar year 1954 shall be used as the base year in computing any annual adjustment. The annual adjustment made on or before January 15, 1965 and made on or before January 15 of each calendar year thereafter shall correspond to the average annual change in the calendar year immediately preceding the year during which the adjustment shall be effective. The adjustment made on or before January 1, 1964, shall correspond to the total of the average annual changes in each calendar year from the 1955 calendar year to the 1963 calendar year, inclusive.

The adjustment provided by this section shall be made only if it operates to effect an increase over the allowance payable for the calendar year immediately preceding.

§ 9360.10

On or before January 15, 1968, and on or before January 15 of each year thereafter, the amount of any allowances provided by this chapter and not subject to Section 9360.9 shall be adjusted by the board to reflect any increase in cost of living occurring after January 1 of the immediately preceding fiscal year. Effective Jan-

uary 1, 1985, the United States city average of the "Consumer Price Index for all Urban Consumers," as published by the United States Bureau of Statistics, shall be used as the basis for determining the changes in the cost of living. For the period from January 1, 1978, through December 31, 1984, the average of the separate indices of the "Consumer Price Index for All Urban Consumers" for the Los Angeles-Long Beach-Anaheim area and the San Francisco-Oakland area, as published by the United States Bureau of Labor Statistics, shall be used as the basis for determining the changes in the cost of living. For the period prior to January 1, 1978, the average of the separate indices for the Los Angeles-Long Beach area and the San Francisco-Oakland area, as published by the United States Bureau of Labor Statistics, shall be used as the basis for determining the changes in the cost of living. The cost-of-living increase shall equal or exceed 1 percent before any adjustment is made in the allowance. The adjustment provided by this section shall be made only if it operates to effect an increase over the allowance payable for the calendar year immediately preceding.

§ 9360.11

Notwithstanding any other provisions of this chapter, any member who would have been eligible to retire under Section 9359.01 had it not been repealed because he did not return to office or who would have been eligible to retire under such section had it not been repealed and had he chosen not to run or not been returned to office following the reapportionment of his district shall be deemed eligible for retirement for purposes of Sections 9360.7 and 9361.1 at any time thereafter.

§ 9361

In lieu of the retirement allowance for his life alone, a member or retired member may elect, or revoke or change a previous election, to have the actuarial equivalent of his retirement allowance as of the date of retirement applied to a lesser retirement allowance, in accordance with one of the optional settlements specified in this article.

§ 9371

This article shall apply to members who elect to be subject to its provisions and shall not apply to any member while his services are included in the federal social security system.

An election pursuant to this section shall be in writing and shall be effective only when received in the office of the board. The board may on the request of any member who elects to be subject to this article, cancel such election if it finds that the election was made because of the member's mistake or misunderstandings and that the member has acted diligently in making such request. Such cancellation shall be effective as of the first day of the month following the board's action canceling the election.

§ 9372

"Survivor allowance" means the allowance provided for in Section 9374.

§ 9373

"Disability," "disabled" or "incapacitated" means, with respect to qualification for a survivor allowance, inability to engage in any substantial gainful occupation by reason of any physical or mental impairment which is

determined on the basis of competent medical opinion secured by the board, to be of permanent or extended and uncertain duration.

§ 9374

Upon the death of a member before retirement (a) the surviving wife or surviving husband of the member, who has the care of unmarried children, including stepchildren, of the member who are under 18 years of age, or are incapacitated because of disability which began before and has continued without interruption after attainment of such age, or if there is no such spouse, then (b) the guardian of surviving unmarried children, including stepchildren, of the member who are under 18 years of age or so incapacitated, if any, or (c) the surviving wife or surviving husband of the member, who does not qualify under (a) of this subdivision, if any, or if no such children under (b) or such spouse under (c), then (d) each surviving parent of the member, shall be paid the following applicable survivor allowance, under the conditions stated and from contributions of the state:

(1) A widow or a widower who was married to such member prior to the occurrence of the injury or onset of the illness which resulted in death, and has the care of unmarried children, including stepchildren, of the deceased member under 18 years of age or so incapacitated, shall be paid three hundred sixty dollars ($360) if there is one such child, or four hundred thirty dollars ($430) per month if there are two or more such children. If there also are such children who are not in the care of the surviving spouse, the portion of the allowance payable under this paragraph, assuming that these children were in the care of the surviving spouse, which is in

excess of one hundred eighty dollars ($180) per month, shall be divided equally among all such children and payments made to the spouse and other children, as the case may be.

(2) If there is no such surviving spouse, or if such surviving spouse dies or remarries, and if there are unmarried children, including stepchildren, of the deceased member under 18 years of age, or if there are such children not in the care of such spouse, such children shall be paid an allowance as follows:

(a) If there is only one such child, such child shall be paid one hundred eighty dollars ($180) per month;

(b) If there are two such children, such children shall be paid three hundred sixty dollars ($360) per month divided equally between them; and

(c) If there are three or more such children, such children shall be paid four hundred thirty dollars ($430) per month divided equally among them.

(3) A widow or widower who has attained or attains the age of 62 years, and, with respect to both widow and widower, who was married to such member prior to the occurrence of the injury or onset of the illness which resulted in death, and has not remarried subsequent to the member's death, shall be paid one hundred eighty dollars ($180) per month. No allowance shall be paid under this subdivision, while the surviving spouse is receiving an allowance under subdivision (1) of this section, or while an allowance is being paid under subdivision (2)(c) of this section. The allowance paid under this subdivision shall be seventy dollars ($70) per month

while an allowance is being paid under subdivision (2)(b) of this section.

(4) If there is no surviving spouse, or surviving children who qualify for a survivor allowance, or if such surviving spouse dies or remarries, or if such children reach age 18 or die or marry prior thereto, each of the member's dependent mother and father who has attained or attains the age of 62 years, and who received at least one-half of his support from the member at the time of the member's death, shall be paid one hundred eighty dollars ($180) per month.

"Stepchildren", for purposes of this section, shall include only stepchildren of the member living with him in a regular parent-child relationship at the time of his death.

§ 9377

The rate of contribution of a member subject to this article shall include in addition to his normal rate, two dollars ($2) per month. Such contributions shall not become a part of a member's accumulated contributions or be treated or administered as normal contributions and shall not be refundable to a member under any circumstances. Such contributions shall be available only for payment of survivors' allowances under this article.

Contributions shall begin on the first of the month or the payroll period following the filing of an election to be subject to this article.

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No. 91-1114

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

CALIFORNIANS FOR A CITIZEN GOVERNMENT,
Petitioners,

VS.

THE LEGISLATURE OF THE STATE OF CALIFORNIA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

RESPONSE OF THE LEGISLATURE OF THE STATE OF CALIFORNIA, ET AL., TO PETITION FOR WRIT OF CERTIORARI OF CALIFORNIANS FOR A CITIZEN GOVERNMENT

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RESPONSE OF THE LEGISLATURE OF THE STATE OF CALIFORNIA, ET AL., TO PETITION FOR WRIT OF CERTIORARI OF CALIFORNIANS FOR A CITIZEN GOVERNMENT

The Legislature of the State of California and most of the other respondents named in this petition for writ of certiorari have separately petitioned for review of the constitutionality of California's lifetime legislative term limits and the standards by which term limits throughout the country should be judged. Petition for a writ of certiorari, *Legislature of the State of California, et al., v. March Fong Eu, et al.* (No. 91-1113) (filed January 8, 1992).[1] As the legislative petitioners discussed in that petition, those questions are of national importance and first impression, and are in

[1] All of the named respondents in this petition are petitioners in No. 91-1113 with the exception of the Board of Administration of the Public Employees Retirement System which was a respondent below and is a respondent in this Court in No. 91-1113.

urgent need of clarification by this Court. Although it upheld lifetime term limits, the California Supreme Court considered itself lacking "specific guidance from the high court" on critical issues involving the right to vote and run for office. *Legislature of the State of California v. Eu*, 54 Cal.3d 492, 517, 816 P.2d 1309, 1324, 286 Cal.Rptr. 283, 298 (1991). Even California's Attorney General expressed major reservations about the constitutional justification for a lifetime ban on further legislative service. Legislature's Petition in No. 91-1113 at 6, 19-20 (quoting Brief of Respondent March Fong Eu at 26).

This petition by Californians for a Citizen Government is essentially a cross petition. It seeks review of a subsidiary issue: whether the federal contract clause permits abrogation of the contract between legislators and the state that sets the parameters for legislative pensions. The California Supreme Court expressed no confusion about the standard concerning pensions; the law is fully developed. The issue is hardly one of immediate national concern, depending as it does so much on state contract law. Indeed, Californians for a Citizen Government's arguments for grant of certiorari rely largely on 19th and early 20th century cases, decided long before workers in this country even enjoyed pension rights. The lengthy cross petition fails to address a central issue of this Court's jurisprudence in reviewing state contract claims: to the extent that the state court does or does not find a contract under state law, this Court will generally defer to that judgment. *See, e.g. Dodge v. Board of Education*, 302 U.S. 74, 79 (1937).

That the California Court was correct on the pension issue, however, in no way detracts from the urgency of the California Legislature's petition for certiorari in No. 91-1113. The California Supreme Court seriously erred in upholding California's unnecessary and disenfranchising lifetime term limits. The constitutionality of term limits is a matter of national importance, deeply touching the most fundamental rights to vote and run for office. The Court can and should limit its consideration of the decision below to the term limits issue presented in No. 91-1113, but whether it so limits the issues or expands them to include the

contract clause question presented in No. 91-1114, certiorari should be granted.

DATED: February 5, 1992.

Respectfully submitted,

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Respondents.

On Petition for Writ of Certiorari To the California Supreme Court

BRIEF IN OPPOSITION OF RESPONDENT BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM

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QUESTION PRESENTED

Does the contract clause of the United States Constitution protect pension rights of California legislators to continued participation in their state pension program, where that right was explicitly granted under the state pension statute, and where the California Supreme Court has for 75 years characterized California public pension rights as protected contractual obligations?

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Respondents.

On Petition for Writ of Certiorari
To the California Supreme Court

BRIEF IN OPPOSITION OF RESPONDENT BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM

Respondent Board of Administration of the Public Employees' Retirement System ("PERS") respectfully requests that this Court deny the petition for writ of certiorari of Intervenor Californians for a Citizen Government ("CCG"), the only party seeking review[1] of that portion of the California Supreme Court's opinion in this case that deals with state pension rights.[2] That opinion is reported *sub nom. Legislature of the State of California et al. v. Eu, et al.* at 54 Cal.3d 492 (1991); the portion of the opinion that strikes down the attempted termination of pre-existing pension rights is reported at 54 Cal.3d 527-34 (CCG Petition at A-47 to A-58).

REASONS WHY THE PETITION SHOULD BE DENIED

The issue in this case is whether the contract clause of the United States Constitution protects California pension rights that the California Supreme Court has unwaveringly characterized as contractual for 75 years, and which were explicitly conferred by statute.

Because contract and property issues are rooted in state law, federal courts grant state courts considerable latitude before intervening to overturn their determinations whether contractual obligations exist. Indeed, in no case cited by petitioner have the federal courts intervened to do what petitioner CCG now asks — to overturn a state

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[1]The only other party who took the same position as CCG below — California Secretary of State March Fong Eu (there represented by the California Attorney General) — has not petitioned for certiorari.

[2]As in the Court below, PERS is not involved in and takes no position on any of the non-pension issues dealt with in the California Supreme Court's opinion, and which are the subject of a separate petition for certiorari, No. 91-1113.

court's determination, based on a uniform course of decision for the last 75 years, that the state has made a contract with its pensioners. The California Supreme Court's decision does no more than hold the state to promises that had been previously characterized as contractual for seven decades. Such a decision does not warrant review.

I.

The California Supreme Court's Characterization Of The State's Treatment Of Its Own Pension Obligations As Contractual Should Be Respected

Contract clause issues require a two step analysis. First, was there a contract in existence? Second, if so, did the action by the state sufficiently impair the contractual obligations to violate the contract clause? *See, e.g., Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938) ("As in most cases brought to this court under the contract clause of the Constitution, the question is as to the existence and nature of the contract and not as to the construction of the law which is supposed to impair it.").

The initial question of whether or not the state intended its own promises to be contractual, or merely to express a mutable public policy preference, depends in the first instance on state law.

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

In consequence, this Court has adopted a policy of deference to state court determinations whether contract rights exist.

> "While we are required to reach an independent judgment as to the existence and nature of the alleged contract, we give great weight to the views of the highest court of the State touching these matters." *Dodge v. Board of Education*, 302 U.S. 74, 79 (1937) (noting that no contract existed under prior Illinois state decisions).
>
> "While this Court in applying the contract clause of the Constitution must reach an independent judgment as to the existence and nature of the alleged contract, we attach great weight to the views of the highest court of the state." *Higginbotham v. Baton Rouge*, 306 U.S. 535, 538-39 (1938) (noting Louisiana's view that no contract existed; citations omitted).

In each of these cases the state court's prior characterization of its state's promises has been a principal concern of this Court.

> "The Supreme Court [of Illinois] answered this contention [that the language of the act at issue indicated an intent to create vested contractual rights] by referring to the fact that for years prior to the adoption of the Miller Law, and by *a uniform course of decision*, it had held that acts indistinguishable from the Miller Law, establishing similar benefit systems, did not create contracts or vested rights and that the State was free to alter, amend, and repeal such laws even though the effect of its action was to deprive the pensioner or annuitant, for the

future, of benefits then enjoyed." *Dodge*, 302 U.S. at 80 (emphasis added).

> "The [Supreme Court of the State of Louisiana] said that the general rule that a municipal council 'may remove at any time any official appointed or elected by the Council, or anyone employed by the Council to perform governmental functions,' had been recognized by its former decisions, which were cited." *Higginbotham*, 306 U.S. at 538-39.

Similarly, in *Pennie v. Reis*, 132 U.S. 464 (1889), the 103-year-old case on which petitioner principally relies, this Court affirmed a prior decision of the California Supreme Court that had concluded that the state legislature had not created any vested rights under the mandatory life and health insurance plan at issue, citing prior California law holding that public officers had no property rights to their office or salary, and that therefore they held only a "mere expectancy." *See Pennie v. Reis*, 80 Cal. 266, 269, 22 P. 176, *aff'd*, 132 U.S. 464 (1889). The California Supreme Court concluded that the challenged statute, which had replaced the prior life and health insurance statute with a comprehensive relief and pension fund (*see* 80 Cal. at 268), "therefore, did not interfere with any vested right, and is not obnoxious to the constitutional principle invoked by petitioner." *Id.* at 269.

Even in *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938), where this Court did overturn the Indiana state court's characterization of a particular obligation as non-contractual, the state court's prior decisions in favor of the existence of a contractual right were a prominent factor in the decision.

> "The courts of Indiana have long recognized that the employment of school teachers was contractual

and have afforded relief in actions upon teachers' contracts." *Id.* at 100-101.

Significantly, this Court was intervening there to uphold the contract, not to destroy contract rights in contravention of prior state decisions as would this petitioner here.

The rule gleaned from this Court's prior cases is that this Court will intervene to overturn a state's characterization of its own obligations only reluctantly, and has never done so for the purpose of dishonoring contractual rights that the state courts previously had found to exist. Indeed, in *Indiana ex rel. Anderson v. Brand*, the only instance of intervention cited by petitioner, this Court noted the state court's own prior decisions that a contract existed, thereby refusing to allow Indiana to dishonor commitments that its courts had previously determined to be contractual.

The federal circuit court decisions cited by petitioners, despite sometimes sweeping language, have similar results. *Compare In re Goodwin*, 57 F.2d 31 (6th Cir. 1932) (no contract pension right found by state court and no impairment found by federal court) *and MacLeod v. Fernandez*, 101 F.2d 20 (1st Cir. 1938) (same), *cert. denied*, 308 U.S. 561 (1939), *with State of Nevada Employees Association v. Keating*, 903 F.2d 1223 (9th Cir.) (contract right found by state court, impairment found by federal court), *cert. denied*, 111 S. Ct. 558 (1990).[3]

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[3]Petitioners have also relied upon a series of federal cases concerning benefits offered by the federal government. *See Deal v. Federal Housing Admin.*, 260 F.2d 793 (8th Cir. 1958) (federal mortgage insurance); *Kizas v. Webster*, 707 F.2d 524 (D.C. Cir. 1983) (FBI hiring preferences), *cert. denied*, 464 U.S. 1042 (1984); *Rafferty v. United States*, 210 F.2d 934 (3d Cir. 1954) (federal pensions); *Abbott v. Morgenthau*, 93 F.2d 242 (D.C. Cir. 1937) (same), *cert. denied*, 303

The importance of a state court's prior decisions was explained in *Dodge*, where this Court indicated that evidence of a state's intent whether or not to be contractually bound could be gleaned from the legislature's presumed knowledge of the existing law in that state.

> "The [state] court further held that the legislature presumably had the doctrine of these cases in mind when it adopted the act now under review and that the appellants should have known that no distinction was intended between the rights conferred on them and those adjudicated under like laws with respect to other retired civil servants. We cannot say that this was error." *Dodge*, 302 U.S. at 81.[4]

In California for the last 75 years there has been "a uniform course of decision" (*see Dodge*, quoted *supra*, at p. 4-5) holding that California public pension obligations are contractual obligations giving rise to vested rights. *See, e.g.*, the cases cited by the California Supreme Court in its decision below (Pet. at A-48 to A-49): *Allen v. Board of Administration*, 34 Cal.3d 114, 192 Cal.Rptr. 762, 665 P.2d 534 (1983) *appeal dismissed*, 465 U.S. 1015 (1984); *Olson v. Cory*, 27 Cal.3d 532, 178 Cal.Rptr. 568, 636 P.2d 532 (1980); *Betts v. Board of Administration*, 21 Cal.3d 859, 148 Cal.Rptr. 158, 582 P.2d 614 (1978); *Miller v.*

U.S. 638 (1938). These cases are inapposite because it has long been decided that the contract clause does not apply to the actions of the federal government. *New York v. United States*, 257 U.S. 591, 601 (1922) ("That section provides that 'no *State* shall . . . pass . . . any law impairing the obligation of contracts,' and does not in terms restrict Congress or the United States.") (emphasis in original).

[4] *See also United States Trust v. New Jersey*, 431 U.S. 1, 19 n. 17 (1977) ("The obligations of a contract long have been regarded as including not only the express terms but also the contemporaneous state law pertaining to interpretation and enforcement.").

State of California, 18 Cal.3d 808, 135 Cal.Rptr. 386, 557 P.2d 970 (1977); *Allen v. City of Long Beach*, 45 Cal.2d 128, 287 P.2d 765 (1955); *Kern v. City of Long Beach*, 29 Cal.2d 848, 179 P.2d 799 (1947); *see also Frank v. Board of Administration*, 56 Cal.App.3d 236, 242, 128 Cal.Rptr. 378 (1976) ("A contractual right is not an expectancy but a chose in action, a form of property which the employee acquires when he enters upon performance of the employment contract.").

Even before the 1947 *Kern v. City of Long Beach* decision, the California Supreme Court had firmly rejected the "gratuity" approach to public pensions and given them a contractual basis. The idea that public pensions in California were mere gratuities was rejected as early as 1917 in *O'Dea v. Cook*, 176 Cal. 659, 661-62, 169 P. 366 (1917):

> "A pension such as this law contemplates is not a gratuity or a gift . . . . [W]here, as here, services are rendered under such a pension statute, the pension provisions become a part of the contemplated compensation for those services and so in a sense a part of the contract of employment itself."

This position was reaffirmed 11 years before *Kern* in *Dryden v. Board of Pension Commissioners*, 6 Cal.2d 575, 59 P.2d 104 (1936):

> "The deceased was a member of the police department for approximately fourteen years before his death, during the entire period of which he paid his required 4 percent of each salary check received. *A pension based upon such facts is not a gratuity.* It is a periodical allowance of money granted by the city in consideration of services rendered or of loss or injury sustained, *and* payments made for that purpose.

> It has been clearly held that the pension provisions of the city charter are an integral portion of the contemplated compensation set forth in the contract of employment between the city and a member of the police department, and are an indispensible part of that contract, and that the right to a pension becomes a vested one upon acceptance of employment by the applicant." 6 Cal.2d at 578-79 (emphasis added).[5]

In its decision below the California Supreme Court first noted that "under both the federal and state contract clauses" California had afforded contractual protection for California public pensions generally. (Pet. at A-48-49.) Having elected to treat legislators like other public employees, California was not now free to change its mind.

> "The state, in adopting the LRS, elected to treat legislators in a manner similar to other state employees, providing them with a plan whereby pension benefits could be acquired through continued service beyond their initial term of office. Having done so, the state cannot thereafter abandon that plan as to incumbent legislators without providing them comparable new benefits." Pet. at A-53.

The differences cited by petitioner among other state courts,[6] as to whether or not their states grant contrac-

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[5]In its criticism of *Kern* as a contravention of *stare decisis*, the petition overlooks the earlier 1936 *Dryden* and 1917 *O'Dea* cases, which had previously recognized the contractual nature of public pensions in California.

[6]Useful summaries of the differing approaches undertaken by the various states can be found in Annot., *Vested right of pensioner to pension*, 52 A.L.R.2d 437 (1957); Comment, *Pensions: Public Employee Pension Plans As Contractual Obligations Granted Constitu-*

tual protection to public pensions, do not invalidate another state's power to incur contractual obligations to its own pensioners. *Cf. United States Trust v. New Jersey*, 431 U.S. at 24 ("Whatever the propriety of a State's binding itself to a future course of conduct in other contexts, the power to enter into effective financial contracts cannot be questioned."); *Dodge v. Board of Education*, 302 U.S. at 78 ("The parties agree that a state may enter into contracts with citizens, the obligation of which the legislature cannot impair by subsequent enactment.").

In sum, petitioner has cited no case in which this Court has intervened to overturn a state court's decision holding the state to its contractual obligations. Indeed, petitioner has failed to cite any case in which this Court, or any other federal court, has overruled a state court's prior uniform course of decision whether state contractual obligations exist. There is no reason in this case to depart from this Court's usual presumption that a state's supreme court ordinarily is the best judge of contract rights granted under state law.

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tional Protection, 20 Washburn L.J. 169 (1980); Achelpohl, *Public Pensions in Nebraska: Good News For The Public Employee*, 16 Creighton L.Rev. 63 (1982); Case Note, *Public Employee Pension Benefits — A Promissory Estoppel Approach*, 10 Wm. Mitchell L.Rev. 287 (1984). In brief, these commentaries disclose the evolution in policy among various states from the "gratuity" approach to the "compensation" approach. *See also Bender v. Anglin*, 207 Ga. 108, 60 S.E.2d 756 (rejecting *Pennie* approach), *cert. denied*, 340 U.S. 878 (1950).

II.

The Prospective Pension Rights Are Protected Because They Were Specifically Included In The Statute At Issue In This Case

Proposition 140 itself acknowledged that the California pension system created vested contractual rights protected from impairment by the contract clause. The initiative declares that "This Section shall not be construed to abrogate or diminish any vested pension or retirement benefit which may have accrued under an existing law. . . ." California Constitution, Article IV, Section 4.5. The issue, therefore, was not the existence of protected vested pension rights, which was conceded, but whether those rights included the ability to continue to accrue service credit for continued time in office after November 1, 1990.

The answer is right in the pension statute. California Government Code § 9356 (Pet. at B-9) provides:

> "Each member of this system shall receive credit for service for time during which he holds office as a legislator after becoming a member of this system."

By cutting off the right to accrue service credit for time during which a legislator held office after November 1, 1990, Proposition 140 contradicted an explicit term of the specific scheme under which the incumbent legislators had served. By protecting the prospective right to continue to accrue service credit into the future, the California Supreme Court was doing no more than holding the state to the explicit promise that it had previously made.

CONCLUSION

The issue in this case is not whether the contract clause protects all pension rights. The issue is whether the contract clause protects public pension rights that California's Supreme Court has unwaveringly characterized as contractual obligations for 75 years, and which were explicitly granted by statute under the voluntary plan at issue. Under these circumstances, there is no need to second-guess a decision of California's highest court that the state's obligations under such a plan are contractual in nature, and hence are protected from impairment by the contract clause of the United States Constitution.

The decision below is compatible with the decisions of this Court, which give great weight to state court determinations whether contract rights exist, and which have unfailingly recognized the existence of contracts that have been conceded to exist by the states involved. The differences among some state courts, as to whether their states grant contractual protection to public pensions, do not invalidate a state's power to incur contractual obligations to its own pensioners. Accordingly, the Petition of CCG for a Writ of Certiorari should be denied.

Respectfully submitted,

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